TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 140

NATHAN WILLNER, PETITIONER,

vs.

COMMITTEE ON CHARACTER AND FITNESS, ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED MAY 23, 1962
CERTIORARI GRANTED JUNE 25, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 21, 1962

[fol. A]

IN THE

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

NATHAN WILLNER, Petitioner,

for an Order permitting him to file his Application for Admission to the Bar.

NOTICE OF MOTION—Dated May 22, 1961

Sirs:

Please Take Notice, that upon the Petition of Nathan Willner, dated and verified the 22nd day of May, 1961, and upon the papers and proceedings heretofore had herein, the undersigned will move this Court, at a Stated Term for Motions, to be held at the Appellate Division Court House, 25th Street and Madison Avenue, Borough of Manhattan, New York City, on the 6th day of June, 1961 at 1:00 o'clock in the afternoon of that day, for an order, granting the Petitioner leave to file his application for admission to the Bar of the State of New York, pursuant to Rule 1(e) of the Rules of Civil Practice, and

For such other and further relief, as the Court may deem just and proper.

Dated: New York, the 22nd day of May, 1961.

Yours, etc.,

Nathan Willner, in Pro Se, 345 East 52nd Street, Borough of Manhattan, City of New York.

To: The Committee on Character and Fitness.

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[Title omitted]

PETITION FOR LEAVE TO FILE APPLICATION FOR ADMISSION TO THE BAR

To the Honorable Justices of the Appellate Division—First Judicial Department:

The Petition of Nathan Willner respectfully shows to this Honorable Court and alleges:

1. This Petition is made by me to obtain leave to file my Application for Admission to the Bar, pursuant to Rule 1(e) of the Rules of Civil Practice.

2. I reside at No. 345 East 52nd Street, in the Borough of Manhattan, City and State of New York.

3. I am a citizen of the United States of America, by reason of my birth in the United States. I am a resident of the State of New York, and have been such resident for more than six months prior to the date of the verification of this Petition.

4. I am over the age of twenty-one years, to wit, of the age of sixty (60) years, having been born on November 7, 1900.

5. I am a Certified Public Accountant, having been duly licensed as such by the State of New York on January 2, 1936; my license Certificate bears number 5245, and my said license has never been revoked or suspended.

6. I am now and have been since May 15, 1951, a member in good standing of the New York State Society of Certified Public Accountants. I am now, and have been since December 11, 1951, a member in good standing of the American Institute of Accountants, which is the recognized National organization of Certified Public Accountants.

[fol. 2] 7. I graduated from the School of Commerce of New York University in 1923, with the Degree of Bachelor

of Commercial Science, and from the Law School of New York University in 1930, with the Degree of Bachelor of Laws, and in 1934 with the Degree of Master of Laws from the same school.

8. I passed the required written examinations for admission to the Bar and was duly certified as qualified by the State Board of Law Examiners on or about October 29, 1936. In 1937, I filed my questionnaire and statement with the Committee on Character and Fitness. Several hearings on my application were had before the Committee on Character and Fitness on various dates, but my application for admission was not acted on favorably, and in October, 1938, the Committee on Character and Fitness filed with this Court its determination that it is "not satisfied and cannot certify that the applicant possesses the character and general fitness requisite for an attorney and counselor at law, as provided by Section 88 of the Judiciary Law", without stating any sufficient reason, excuse or standard. The conclusion was entirely based upon an impression and not on any valid determination.

9. On January 26, 1943, I applied to this Court for an Order directing the Committee to review its determination of October 1938. The motion was denied, *without opinion.*

10. On January 20, 1948, I petitioned this Court for an Order directing the Committee on Character and Fitness to re-examine my application, or, in the alternative, permitting an application *de novo* to be filed by me. This petition was granted by this Court to the extent of permitting me to file an application *de novo* with the Committee on Character and Fitness.

[fol. 3] 11. After I filed such application *de novo*, hearings were had before the Committee on July 16, 1948 and on November 10, 1948, after which the Committee again refused to certify me for admission to the Bar, by its Report of June 9, 1950, without stating any sufficient reason, excuse or standard.

12. Thereafter, in order to determine the reason, excuse or standard or even the impression, on April 10, 1951 I

petitioned this Court for an Order (1) directing the Clerk of this Court to enter my name as an attorney and counselor at law on the Roll of Attorneys and Counselors, (2) directing the Committee on Character and Fitness to file a statement of the reasons upon which the Committee based its refusal to certify me, and (3) appointing a Referee to hear and report upon the evidence taken before, as whether I possess the character and fitness entitling me to be admitted. The motion was denied, *without opinion.*

13. On the 1st day of May, 1954, I petitioned this Court for an Order permitting me to file an application for admission to the Bar *de novo.* By resettled Order, dated the 18th day of May, 1954, my application was denied *without stating any reasons whatever.* Leave to appeal from the said resettled Order was denied by this Court and by the Court of Appeals. Thereafter, an application for a Writ of Certiorari to the Supreme Court of the United States was denied *without* giving any reason, excuse or standard.

14. On the 6th day of September, 1960, I petitioned this Court for an Order permitting me to file an application for admission to the Bar *de novo.* This petition was denied by order dated November 2, 1960, *without* giving any reason, excuse or standard.

[fol. 4] 15. Although less than a year has elapsed since the denial of my last application, I feel so strongly concerning the merits of my case that I ask the Court to carefully consider the reasons which I gave in my last application and to consider some of the background which is stated in this application for the *first time.* I hesitated to make the accusations that I do make herein until I felt I had no other recourse. At this time I feel that this is my last opportunity to present all of the facts surrounding the various hearings and do so with the hope that the Court will recognize the basic injustice that has been done to me.

16. I ask the Court to consider the following:

a) That I am a member in good standing of the New York Society of Certified Public Accountants, and have been such since 1951.

b) That I am a member in good standing of the American Institute of Accountants, and have been such since 1951.

c) That I was admitted to the Tax Court of the United States in 1928, and I remain at present in good standing.

d) That I hold a Treasury Card which entitles me to practice as an accountant before the United States Treasury Department since 1928, and remain in excellent standing there.

e) That, if admitted to the Bar, I can be of material help to many of my accounts in the ever expanding field of taxation and its related legal problems, which, of course, I cannot handle unless I am admitted as an attorney.

f) That I have conducted my life in a proper, decent and circumspect manner, and I stand ready to with-[fol. 5] stand the closest scrutiny of my life and activities. In fact, I seek and welcome such opportunity in order to establish my present character and fitness, as it affects my admissibility to the Bar.

17. The basic facts concerning the background of my various hearings, which I refer to in Paragraphs "8" to "14" of this application, are as follows: In 1937 I filed my questionnaire and statement with the Committee on Character and Fitness and had a first meeting with this Committee, which consisted of Mr. Sol Stroock, as Chairman, and Mr. Basil O'Connor and Mr. Millard Ellison as the other two members of this Committee, which made a committee of three members only. At this meeting I was confronted with a letter signed by an attorney, Leo M. Wieder, whose office address I believe is now 1501 Broadway, New York City. This letter claimed that I clerked for the said Leo M. Wieder and that I said disparaging things about him which resulted to his damage in the sum of $1,000.00.

18. At this meeting I told the said Committee that the letter was a falsehood and that it was instigated by the threat of extortion, the price of which was plainly labeled

in the letter. Mr. Sol Stroock promised a confrontation and an opportunity for me to prove that the letter of Leo M. Wieder was false and motivated by a desire for personal gain.

19. After an interval of several months and an announcement in the Law Journal of the next meeting of the Committee on Character and Fitness, I submitted the affidavit of Samuel Wolbarst, an attorney who was a *partner* in practice with the above mentioned Leo M. Wieder. This [fol. 6] affidavit confirmed that I never served any clerkship in that office and that Mr. Wieder's statements in the said letter were untrue. Mr. Wolbarst appeared at the Appellate Division building, ready and willing to testify under oath before the Committee on Character and Fitness that the said Leo M. Wieder falsely stated the facts and did so in an effort to extract $1,000.00 from me. Mr. Wolbarst was prepared to testify that based on his knowledge of Mr. Wieder, Mr. Wieder's testimony should not be given credence by this Committee. Mr. Wolbarst was ready to testify that Mr. Wieder permitted betting on horseraces at his office (which caused the dissolution of the partnership) and was prepared to give facts and name names concerning those persons who were in the office engaging in illegal activities— a) Irving Rosenberg who had as a handicapper a man formerly connected with the Morning Telegraph and known only as "Harry"; b) a bookmaker by the name of Goldsmith who phoned the notorious Mr. Ericson in order to place bets with him for the participants in Mr. Wieder's office.

20. Mr. Wieder was presumably incensed against me because I had to sue one, Adolf Hunter, for moneys due me. Mr. Wieder was defense counsel and his cross-examination consisted only of whether I had made disparaging remarks about him (Mr. Wieder). Mr. Wieder interposed this defense against my claim falsely and maliciously with absolute knowledge that his defense was false and conceived in malevolence because Mr. Hunter was then in Canada and safely immune from the jurisdiction of any subpoena of the Court, or of the Committee on Character and Fitness. The Court struck the defense from the record and judgment was rendered in my favor in full.

21. When I was finally called before the Committee, Mr. Stroock had only one sentence to say to me as he did on the three previous occasions and that was "You are excused". This was the meeting at which Mr. Wolbarst was [fol. 7] present and since nothing else transpired, Mr. Wolbarst and I could only infer that the Committee refused a confrontation of Mr. Wieder.

22. I later learned that the said Irving Rosenberg came to my office to collect $500.00 for Mr. Wieder which would induce Mr. Wieder to retract the statements made in his letter to the Committee. This information was given to the Committee, and at the suggestion of one member, Mr. Herman A. Heydt, was brought to the attention of Mr. Joseph Murphy. Thereafter, two New York City detectives heard Mr. Rosenberg ask for the money in my office for Mr. Wieder. Later, District Attorney Josephs arranged for a time for the payment of the money to Mr. Wieder but Mr. Wieder did not show up at the appointed time. It was Mr. Heydt who concluded that only Mr. Joseph Murphy, Secretary of the Committee on Character and Fitness, could have informed Mr. Wieder not to show up at the appointed time.

23. After a few months my name was again listed in the Law Journal. This itself caused embarrassment to me for I was at that time a practicing Certified Public Accountant with a good reputation and a family consisting of my wife and two children, and parents who required my support. I received calls and questions from people who asked why my name appeared in the Law Journal as often as it did. I felt that my reputation was being frittered away even before I appeared before the Committee for the fourth time and even then was not given an opportunity to confront Mr. Wieder.

24. I got the impression that this fourth meeting was a field day for Mr. O'Connor and Mr. Ellison. Their questions and inferences were filled with innuendos and prejudice, all of which did not have a single thing to do with my clerkship. At the same time, the said Mr. Joseph Murphy, Secretary of the Committee and presumably the right

[fol. 8] arm of the Committee, was taking testimony based upon supposedly credited accuracy, none of which was proven. I now charge that the testimony, through the minutes, was intentionally distorted by the said Mr. Joseph Murphy so that the written testimony was not in fact, but the assumptions of Mr. Joseph Murphy and are not mine, predicated by him on the presumption that the minutes could not be procured by anyone because they were confidential.

25. There is a further background concerning these hearings and the hardly believable activities of Mr. Joseph Murphy. Mr. Murphy, before he assumed his duty as Secretary of the Committee, was a resident of Peekskill, New York. Mr. Murphy owed his position as Secretary to the intervention and recommendation of an attorney in Peekskill, New York, by the name of James Dempsey. Prior to the fourth announcement of my name in the Law Journal as a candidate awaiting admission to the Bar, I had occasion to institute a lawsuit against a client of the said James Dempsey for a fee due me for professional accounting services rendered. Mr. Dempsey made various motions and interposed a counterclaim. The motions were denied and it was apparent that his client would have a judgment against him for my fee. Whereupon Mr. Joseph Murphy called me into the office of the Committee at 51 Madison Avenue, New York City and told me that my admission to the Bar would depend upon my withdrawing the suit against Mr. Dempsey's client. He insisted that unless this were done I would not be admitted and it must be done forthwith. Under the stress and strain in which I found myself and in view of the advantages for which I had worked so long and paid so dearly, I acceded to his demand and withdrew my suit.

[fol. 9] 26. When the fourth meeting was scheduled before the Committee (Mr. Basil O'Connor and Mr. Millard Ellison), it became manifest to me that Mr. Murphy was a tool of Mr. Dempsey whose purpose was to *destroy me*. A client of mine in Peekskill, New York, one Charles Weller, stated that Mr. Murphy, in a conversation with him, told

him that all his actions and recommendations and falsifications were based on "Dempsey's orders". To impress upon the Court that I am not making wild accusations against people with impeccable character, it is a matter of record that shortly after the incident referred to, Mr. James Dempsey was charged by Mr. Oliver King, an attorney practicing in White Plains, New York, that he, James Dempsey, tampered with juries before whom he tried cases.

27. These protracted hearings, which were a stress and strain upon me, affected my health and my work. My practice deteriorated and in 1944 I suffered a heart attack and my family was destitute and actually evicted from our apartment for non-payment of rent. All this was *known* to the Committee on Character and Fitness.

28. On or about July 16, 1948 when I filed my application *de novo* and a Committee hearing was had; it was there for the first time that I found out that my wife was called to the office of the Chairman of the Character Committee, and there examined about our life together. My wife became hysterical and passed out completely, because we were deprecated by the Committee for no reason whatsoever except that Mr. Basil O'Connor and Mr. Millard Ellison were in cahoots with Mr. James Dempsey. She was revived and then pressed into the deepest secrecy about not mentioning the incident to me. My wife was never the [fol. 10] same again. She suffered migraine headaches for days on end; she had nightmares and lost consciousness many times during the day. For a long time she became mentally retarded. That, too, was not enough for Mr. Millard Ellison and Mr. Basil O'Connor.

29. The record, though strained and bent, will show how Mr. Basil O'Connor was anxious to determine what my income was in 1948 and how he and Mr. Ellison were planning to disrupt my career and even cut my livelihood down more and more. Mr. Ellison went out of his way to file charges before the Grievance Committee of the New York State Society of Certified Public Accountants by inferring that I had said untruths. Nevertheless, after a thorough

hearing before the New York State Society of Certified Public Accountants I was completely exonerated by the Grievance Committee.

30. Mr. Millard Ellison had at his disposal the knowledge gained in the District Attorney's office and in the Crime Commission. Only he alone could conjure up any situation to fit any possible derogatory false premise by either introducing a false state of fact, or a crooked statement like the one introduced at my hearing by Sylvester Barone; in an alleged transaction whereby Sylvester Barone gave me money for an honest purpose. Whereas, in fact, Sylvester Barone tried to pass off forged warehouse receipts for bonded liquor. It was Robert F. Wagner, Jr., now Mayor of the City of New York, who was then a practicing attorney at 120 Broadway, New York City whom I engaged to aid me and in turn exposed the situation.

31. I ask the Court to consider this entire background in connection with the charges which were apparently sustained by the Committee and which referred to my clerkship. The plain facts of the matter are that I had a *Master of Laws degree* and *needed no clerkship.* It would be straining the imagination and credulity of people experienced in [fol. 11] life, in business and in profession for me to lie about a clerkship when it was not necessary for me to have one. It would also appear to me that the believability of one lawyer, Mr. Wolbarst, the partner of Mr. Wieder, the accuser, could be relied upon with the same effect and belief. In spite of all that has passed, I still believe in the principle that a person is innocent until proven guilty. My proof was sidetracked by Mr. Basil O'Connor and Mr. Millard Ellison.

32. One of the items discussed by the Committee was the question of whether I had always been a member in good standing of the New York State Society of Certified Public Accountants. Many thousands of words were spent in discussing what was a mere technicality. The Society had informed me that if I paid up the dues that were then due, I would then be admitted forthwith. The Committee determined that until I was formally reinstated I was not

a member in good standing. The records of the Society and the Secretary of the Society will bear out completely that I have always been a member in good standing except for a period when I was delinquent for non-payment of dues during a depression period and for no other reason, and that there is no derogatory history concerning my membership, except that by the action of the Character Committee I could not earn a sufficient sum to support my family and pay the required dues at the same time. The Committee itself was instrumental in moving obstacles in my path to cut off my livelihood.

33. There were other matters before the Committee, all of which I believe were explained fully and would leave no inference of anything discreditable to me, certainly not to the extent of denying me admission to the Bar. Although my heart is full and the many years that have elapsed have [fol. 12] given me a minute introspection and analysis of all that has gone before, I realize that I cannot burden this Court unduly and recite in full all the matters reviewed, some of which might appear to be unimportant to this Court.

34. About two years ago, I was sent by a reputable lawyer to Mr. Roger Bryant Hunting, Secretary of the Bar Association at 44 West 44th Street, New York City. Mr. Hunting asked for and received my entire file in the matter. After several weeks Mr. Hunting notified me that he reviewed everything and had come to a conclusion. The conclusions he reached are set forth herein: A) That there is *nothing* in the record or file, or attending documents that could possibly impeach my character; B) All innuendos or inferences of bad character were completely *dispelled;* C) That the Character Committee acted solely on *impressions* that they got of me; and that a mere picturization was enough to destroy a man utterly and completely.

35. There have been times and occasions when the members of the Committee themselves received adverse notorious publicity and were raked over the coals in the public press, yet they continued as members of the Committee. Though nothing has ever been cast on me that I

could not prove to be false, malicious and conjured up by the two members of the Committee, Mr. Basil O'Connor and Mr. Millard Ellison, I have to endure 24 years of torturous suffering, and my family brought to disgrace, only because I studied law and achieved a Master of Laws at great expense and deprivation to my family, especially when a depression holocaust engulfed the United States. Those facts were completely rejected by the Character Committee.

36. I trust that I have submitted enough to warrant a hearing before the present Committee to determine my [fol. 13] present status and to give me the opportunity of proving to the Committee that those statements which I have made are in fact the truth. I believe that I have not only been prosecuted but persecuted by people who have their own particular axes to grind and who have no compassion or regard for the rights and welfare of others. I have made bold statements and I am prepared to prove those statements by those rules of evidence which this Court recognizes. I again ask for the opportunity to do so and to sustain my own burden of proving before a tribunal of this Court the worth and merit of my petition.

Wherefore, I pray this Court that it afford me the opportunity: a) of appearing before the Committee on Character and Fitness; b) to grant leave to appear before a Referee of this Court to hear and determine the facts alleged by myself and report back to the Appellate Division; c) that if the Court feels that I have been punished, harassed and deprived of an equal opportunity under the law, that I be admitted on its own motion forthwith.

Dated: New York, the 22nd day of May, 1961.

Nathan Willner, Petitioner.

[fol. 14] *Duly sworn to by Nathan Willner, jurat omitted in printing.*

[fol. 15]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

FIRST JUDICIAL DEPARTMENT

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO FILE APPLICATION FOR ADMISSION TO THE BAR—June 29, 1961

The above-named petitioner having moved this Court for an order granting petitioner leave to file his application for admission to the Bar of the State of New York, *de novo*, pursuant to Rule 1(e) of the Rules of Civil Practice; and for other relief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the petition of Nathan Willner, duly verified the 22nd day of May, 1961, in support of said motion, and after hearing Mr. Nathan Willner, pro se, for the motion, and no one appearing in opposition thereto,

It is ordered that the said motion be and the same hereby is denied.

Enter:

Vincent A. Massi, Clerk.

[fol. 16]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO APPEAL—
Dated July 27, 1961

Sirs:

Please Take Notice, that upon the annexed affidavit of Nathan Willner, dated and verified the 27th day of July, 1961, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court, at a

stated term for motions, to be held at the Appellate Division Court House, 25th Street and Madison Avenue, Borough of Manhattan, New York City, on the 6th day of September, 1961 at 1:00 o'clock in the afternoon of that day, for an order granting leave to appeal to the Court of Appeals of the State of New York from the final order of this Court entered in the office of its Clerk on the 29th day of June, 1961, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y., July 27, 1961.

Yours, etc.,

Dodd, Cardiello & Blair, Attorney for Petitioner,
100 West 42nd Street, New York 36, New York.

To: The Committee on Character and Fitness.

[fol. 17]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[Title omitted]

AFFIDAVIT

State of New York,
County of New York, ss.:

Nathan Willner, being duly sworn, deposes and says:

1. That he resides at 345 East 52nd Street, in the Borough of Manhattan, City of State of New York.

2. That he is a citizen of the United States and a resident of the State of New York, and has been for more than six months prior to the date of this motion.

3. That he was born on November 7, 1900.

4. That he is a certified public accountant having been licensed by the State of New York on January 2, 1936; that his license certificate bears number 5245, and his license has never been revoked or suspended.

5. That he is now and has been since May 15, 1951, a member in good standing of the New York State Society of Certified Public Accountants. That he is now and has been since December 11, 1951, a member in good standing of the American Institute of Accounts, a national organization of Certified Public Accountants.

6. That he graduated from the School of Commerce of New York University in 1923, with the degree of Bachelor of Commercial Science, and from the Law School of New York University in 1930, with the degree of Master of Laws.

7. That he passed the required written examinations for admittance to the Bar, and was duly certified as quali- [fol. 18] fied by the State Board of Law Examiners on or about October 29, 1936. In 1937, he filed his questionnaire and statement with the Committee on Character and Fitness, and after several hearings the said Committee filed its determination that it is "not satisfied and cannot certify that the applicant possesses the character and general fitness requisite for an attorney and counselor at law, as provided by Section 88 of the Judiciary Law." That he has applied to this Court to review the determination of the Character Committee in 1943 and that he has made other petitions throughout the years without success.

8. That he has left no stone unturned to clear his name of the implications and innuendoes which have crept into the file, and that as a matter of fact he has lived an exemplary life as indicated by the fact that since he was admitted to the Tax Court of the United States in 1928 he has remained and is at present in good standing before this Court. That he has handled numerous matters involving trust and has been held in high esteem by clients and many others of the Certified Public Accountant Fraternity. That he feels, with all due respect to this Court, that he can get a fair hearing in a new forum.

Wherefore, affiant respectfully requests that this Court grant him an order permitting leave to appeal to the Court of Appeals on the ground that there is no sufficient basis

in the record for denying petitioner's application for admission to the Bar.

Nathan Willner.

Sworn to before me this 27th day of July, 1961.

James A. Cardiello, Notary Public, State of New York, No. 31-5806835, Qualified in New York County, Commission Expires March 30, 1963.

[fol. 19]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO APPEAL—
September 21, 1961

The above named petitioner having moved for leave to appeal to the Court of Appeals from the order of this Court, entered on the 29th day of June, 1961,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Nathan Willner in support of said motion, and after hearing Messrs. Dodd, Cardiello & Blair for the motion, and no one appearing in opposition thereto,

It is hereby unanimously ordered that the said motion be and the same is hereby denied.

Enter:

Vincent A. Massi, Clerk.

[fol. 20]

IN THE COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of

NATHAN WILLNER, Petitioner,

for an Order permitting him to file his Application for his Admission to the Bar.

NOTICE OF MOTION FOR LEAVE TO APPEAL—
Dated December 31, 1961

Sirs:

Please Take Notice, that on the affidavit of Nathan Willner, verified the 21st day of December, 1961, the order of the Appellate Division, First Judicial Department, filed and entered in the 19th day of June, 1961, which order denied the application of the above named Nathan Willner for an order granting him leave to file his application for admission to the Bar of the State of New York, pursuant to Rule 1 (e) of the Rules of Civil Practice and the order of the said Appellate Division, filed and entered in the Office of the Clerk of said Appellate Division on the 21st day of September, 1961, which denied the motion of the said petitioner, Nathan Willner, for leave to appeal to the Court of Appeals of the State of New York, and on the record of the Court below, the said petitioner, Nathan Willner will move before the Court of Appeals, at a Stated Term thereof, to be held in the Court of Appeals Hall, Eagle Avenue, City of Albany, New York, on the 8th day of January 1962, at the opening of court, for an order granting him permission to appeal to the Court of Appeals from the order of said Appellate Division, filed and entered on June 29, 1961.

[fol. 21] Petitioner also prays the Court that it waive the provision of Rule XXI of the rules of the Court requiring that the papers on a motion for leave to appeal be printed, and to accept typewritten papers in lieu thereof. The rea-

sons are set forth in the affidavit of petitioner, verified on December 4, 1961 and hereto annexed.

And for such other and further relief as may be fair, just and equitable.

Dated, December 21st, 1961.

Yours etc.

Henry Waldman, Attorney for Petitioner, 5 Beekman Street, New York 38, N. Y.

To: Committee on Character and Fitness, First Judicial Department.

[fol. 22]

IN THE COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

PETITIONER'S MOVING AFFIDAVIT

State of New York,
County of New York, ss.:

Nathan Willner, being duly sworn, deposes as follows:

I am the petitioner above named.

This affidavit is made by me in support of my application to the Court of Appeals for leave to appeal to that Court from the final order of the Appellate Division, First Department, which denied my motion for admission to the Bar. I moved in the said Appellate Division for permission to appeal but the motion was denied.

I reside at 345 East 52nd Street, Manhattan, New York City. I am a citizen of the United States, by reason of my having been born in the United States on November 7th, 1900. I am a certified public accountant, having been licensed as such by the State of New York on January 3rd, 1936; my license number is 5245. Said license has never been suspended or revoked. I am a member in good standing of the New York State Society of Certified Public Accountants. I am a member in good standing of the American Institute of Certified Public Accountants, which is the rec-

ognized national organization of Certified Public Account-
[fol. 23] ants; and The New York State Society of Certified Public Accountants.

I graduated from the School of Commerce of New York University in 1923 with the degree of Bachelor of Commercial Science, and from the Law School of New York University in 1930 with the degree of Bachelor of Laws; and in 1934 with the degree of Master of Laws from the same Law School. I passed the required written examination for admission to the Bar, and was duly certified as qualified by State Board of Law Examiners on or about October 29, 1936. In 1937, I filed my questionnaire and statement with the Committee on Character and Fitness. Several hearings on my application were had before the Committee and in October, 1938, the Committee filed a report with the Appellate Division that it is "not satisfied and cannot certify that the applicant possesses the character and general fitness requisite for an attorney and counselor at-law, as provided by Section 88 of the Judiciary Law", without stating any reason. The conclusion was wholly based upon a personal impression, and not upon a validly determined finding of fact.

Ever since, I have been trying, by repeated applications to be admitted to the Bar, but without success.

A copy of my petition, dated May 22, 1961 and notice of motion was duly and timely served on the Secretary of the Committee on Character and Fitness, at his office, 51 Madison Avenue, New York City. On the return day of the motion, June 6th, 1961, the Committee failed to appear, either in person by a member, or its secretary, or by the service of an answer to my petition. It wholly ignored the proceeding. The Court however denied my application unanimously, and without opinion. On my subsequent mo-
[fol. 24] tion for leave to appeal to the Court of Appeals, the Committee pursued the same course—it failed to appear in opposition, either in person, or by an opposing affidavit; it again ignored the motion. Again the Appellate Division denied the motion, unanimously and without opinion.

I did not serve the Committee with a copy of the orders, for the reason that it had not appeared, and the further reason that it was the prevailing party, a rather anomalous situation. However, the Committee was timely served with the motion papers of both motions, and will be timely served with the moving papers and brief on this motion.

An examination of the record in this proceeding will disclose that the Committee reported adversely to my admission mainly, and perhaps, solely, because of accusations made by two lawyers, Leo M. Wieder who was discredited and James Dempsey who was brought up on charges of jury tampering. To the best of my knowledge, they were made in writing, whether by simple letters or by formal affidavits, I do not know. In either way, they were ex parte statements, which had common law rules of procedure and evidence followed, would have been clearly inadmissible.

I was never confronted by either accuser, and hence, I was not afforded the opportunity of cross examining them, though I was always prepared to do so.

An application for admission to the Bar is a formal special proceeding, in nowise different than any such proceeding. The applicant must satisfy the Court that he possesses the knowledge of law required; this he proves by the certificate of the Board of Law Examiners, which [fol. 25] avers that he has been examined and found qualified. And the applicant must further prove that he is a person of good moral character, which he does by showing that the Committee on Character and Fitness has certified to the Court its approval of his character and fitness. The fact that the Appellate Division is the court of origin or of first instance is no reason for ignoring the fundamental common law rules of evidence, particularly the rule—which antedates Magna Charta—that an accused has the right to be confronted by his accuser, with the right to cross examine him. I have been informed (largely through questions asked me at hearings before the Committee) that certain letters, and probably other oral and written accusations were made against me. However, I was never afforded the opportunity of confronting my accusers, of

having the accusers sworn and cross examining them, and the opportunity of refuting the accusations and accusers.

In other words, I was denied the right of presenting my defense because of the prejudice of the Committee at the dictates of the aforementioned lawyers.

An application for admission, being a formal special proceeding, culminates in a formal order or decree, either granting admission or denying it. Such an order or decree should be based on findings of fact and conclusions of law. Facts can only be found on competent evidence, properly adduced from witnesses, who must confront the parties, be sworn and submit to cross examination. An ex parte Statement, oral or written, is not competent evidence, and [fol. 26] a finding of fact, based thereon, is not a foundation upon which a decree can rest, and could be solicited by the members of the Character Committee.

The evidence upon which the Committee based its refusal to recommend my admission was not competent evidence. Hence, not only have I been deprived of a fair trial, but of any trial at all. A fair trial is part of "due process".

Admission to the Bar is deemed a privilege. But is it a privilege in the true sense of the word? Webster defines the word as: "a right, immunity, benefit or advantage enjoyed by a person or body of persons beyond the common advantage of other individuals". A privilege which is available to everyone, may not be denied to anyone, except for sound legal reasons, proved by competent evidence, and not by falsified impressions.

Involved here is an angle which may not be overlooked. Lawyers are officers of the courts and therefore, part of the personnel of the judiciary system of the state. So, the state deems it necessary to invite persons to engage in the study of law and impliedly agrees that every person who has studied law for a certain period, and by the test of examination is found to have sufficient knowledge of it, and further, is of good moral character and fitness, will be licensed to practice law as a profession.

The person who accepts the implied invitation, attends law school for three or four years and qualifies for admission by passing the Bar examination, is beyond question

entitled to admission, unless he is found to be a person of bad moral character. The Appellate Division refers the [fol. 27] issue of character to its Committee on Character. In a sense, every member of the Committee is a referee. The question of character is one of the two issues involved in the proceeding, and like any issue of fact, should be determined by a formal trial or hearing, and in accordance with common law rules of procedure and evidence, followed by findings of fact and conclusions of law. Such course was not followed here at all, and had not even the semblance of affording such opportunity. The Committee, acted as if affronted.

In this and in all proceedings brought by me in the Appellate Division and in the higher courts, my applications for admission were denied without opinion. No reason—not even a two line memorandum—accompanied the decisions, despite the fact that I constantly contended that I was deprived of a fair trial, a right to which I was entitled under the United States Constitution and the New York State Constitution, as well.

It should be borne in mind, that a refusal to admit one to the Bar is a stigma which he must bear throughout his life. The smudge affects his family, as well. The fact that a high court has found, as a fact, that by reason of lack of good character, he is unfit to be a member of the Bar, handicaps him in any activity or business he may engage in. In an economic sense he is in no better situation than an ex-convict. That has been fully set forth in the moving papers before the Appellate Division.

I contend that the time, effort and money spent by me in law school is an asset and not a mere privilege. My [fol. 28] counsel will discuss this phase fully in his brief.

Should I be granted permission to appeal to this Court, I will limit my contentions to the following:

1. Was I entitled to confrontation of my accusers? To have them sworn as witnesses, and subject them to cross examination?

2. If so, did the denial of confrontation etc. deprive me of a fair trial on the issue of character?

3. Did such denial etc. violate my rights under the Constitution of the United States and under the Constitution of the State of New York, as well?

Nathan Willner.

Sworn to before me this 21st day of December, 1961.

Henry Waldman, Commissioner of Deeds, City of New York, New York County Clerk's No. 126-1, Commission Expires Dec. 20, 1962.

[fol. 29]

IN THE COURT OF APPEALS OF NEW YORK

1

Mo. No. 48

In the Matter of the Application of NATHAN WILLNER, for an Order permitting him to file his application for admission to the Bar, Appellant,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL DEPARTMENT, Respondent.

ORDER GRANTING LEAVE TO APPEAL—January 11, 1962

A motion for leave to appeal to the Court of Appeals &c. in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had;

Ordered, that the said motion be and the same hereby is granted.

[fol. 30]

IN THE COURT OF APPEALS OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Filed January 23, 1962

Sirs:

Please Take Notice, that Nathan Willner, the above named appellant, hereby appeals to the Court of Appeals of the State of New York, from the order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, made and entered in the Office of the Clerk of said Appellate Division on June 29, 1961, which order denied the motion of said Nathan Willner for leave to file his application for admission to the Bar, and he appeals from each and every part of said order and from the whole thereof.

Said Nathan Willner appeals by permission of the Court of Appeals, evidenced by its order granting permission, dated and entered in the Office of the Clerk of the Court of Appeals on January 11, 1962.

Yours etc.,

Henry Waldman, Attorney for Appellant, 5 Beekman Street, New York 38, N. Y.

To: Clerk of the Court of Appeals. Clerk of the Appellate Division. Committee on Character and Fitness, First Judicial Department.

[fol. 31]

IN THE COURT OF APPEALS OF NEW YORK

In the Matter of the Application of

NATHAN WILLNER, Appellant,

for an Order Permitting him to file his application for admission to the Bar,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL DEPARTMENT, Respondent.

ORDER OF AFFIRMANCE—April 5, 1962

This cause having been argued by Henry Waldman, Esq., of counsel for the appellant, and having been submitted upon the part of the respondent, and due deliberation having been thereupon had, it is

Ordered and Adjudged that the order appealed from be and the same hereby is affirmed without costs. No opinion.

[fol. 32]

IN THE COURT OF APPEALS

REMITTITUR—April 5, 1962

[fol. 33]

No. 113

In the Matter of the Application of

NATHAN WILLNER, Appellant,

for an Order Permitting him to file his application for admission to the Bar,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL DEPARTMENT, Respondent.

Be It Remembered, That on the 9th day of March in the year of our Lord one thousand nine hundred and sixty-two,

Nathan Willner, the appellant in this cause, came here unto the Court of Appeals, by Henry Waldman, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Committee on Character and Fitness, First Judicial Department, the respondent in said cause, for whom there was no appearance.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 34] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Waldman, of counsel for the appellant, no appearance for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily upon a question under the Constitution of the United States, viz: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

[fol. 35] Therefore, it is considered that the said order be affirmed, without costs, &c. as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in

such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 5, 1962.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 36]

IN THE COURT OF APPEALS OF NEW YORK

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1 Mo. No. 331

In the Matter of the Application of

NATHAN WILLNER, Appellant,

for an Order permitting him to file his application for admission to the Bar,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL DEPARTMENT, Respondent.

ORDER AMENDING REMITTITUR—April 26, 1962

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when

returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights.

And the Appellate Division of the Supreme Court, First Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

[fol. 37]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

[fol. 38]

SUPREME COURT OF THE UNITED STATES

No. 140, October Term, 1962

NATHAN WILLNER, Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, ETC.

ORDER DENYING MOTION OF RESPONDENT TO DISMISS THE WRIT OF CERTIORARI—November 13, 1962

On Consideration of the motion of the respondent to dismiss the writ of certiorari,

It Is Ordered by this Court that the said motion be, and the same is hereby, denied.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 140, SUMMARY CALENDAR

NATHAN WILLNER,

PETITIONER APPELLANT,

vs.

COMMITTEE ON CHARACTER AND FITNESS,
APPELLATE DIVISION OF THE SUPREME
COURT OF THE STATE OF NEW YORK,
FIRST JUDICIAL DEPARTMENT,

RESPONDENT APPELLEE.

It hereby is stipulated by and between the respective attorneys for the above named parties, that the ninety six items, set forth in Respondent-Appellee's 'Amended cross Designation' be included and made part of the Record, but that the printing of same be dispensed with.

Dated, New York N.Y. October 26, 1962.

Attorney for Petitioner-Appellant

Attorney for Respondent-Appellee

IN THE

Supreme Court of the United States

October Term, 1961

No. ~~995~~ 1410

NATHAN WILLNER,
Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HENRY WALDMAN,
Attorney for Petitioner,
5 Beekman Street,
New York 38, New York.

HENRY WALDMAN,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1961

No.

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Nathan Willner, your petitioner, prays respectfully, that a writ of certiorari, directed to the Court of Appeals of the State of New York, be issued, to review the amended remittitur or final order of the said Court of Appeals, which affirmed the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which said order denied petitioner admission to the Bar of the State of New York.

The affirmance by the Court of Appeals was without opinion.

A motion to amend the remittitur was made by petitioner; the motion was granted and the remittitur was amended by adding to it the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the

Constitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights."

Jurisdiction

The jurisdiction of the Court is invoked under Title 28, Sec. 1257(3), U. S. C., and upon the amended remittitur of the Court of Appeals, which states that a question under the Constitution of the United States was raised by the petitioner and necessarily passed upon by the Court.

Question Presented

Whether the Committee on Character and Fitness deprived petitioner of his constitutional rights in refusing to require two lawyers who had presented charges of lack of character and fitness, to appear in person before the Committee, confront the petitioner, be formally sworn as witnesses, and be subject to cross-examination in a formal judicial hearing, conducted in accordance with common law procedure and rules of evidence?

Statement

Petitioner resides at No. 345 East 52nd Street, Manhattan, New York City. He is a citizen of the United States by reason of birth on November 7, 1900. By profession he is a certified public accountant of the State of New York, having been licensed as such by the State of New York on January 3, 1936; his license number is 5245; his license has never been suspended or revoked. He is a member in good standing of the New York State Society of Certified Public Accountants and of the Ameri-

can Institute of Certified Public Accountants, the recognized national organization of Certified Public Accountants.

He graduated from the School of Commerce of New York University in 1923 with the degree of Bachelor of Commercial Science; and from the Law School of New York University in 1930 with the degree of Bachelor of Laws and in 1934 with the degree of Master of Laws from the same law school. He passed the written examination for admission to the Bar and was duly certified as qualified by the New York State Board of Law Examiners on or about October 29, 1936.

Under New York law, admission to the bar is made by the Appellate Division of the Supreme Court of the State of New York. The name, Supreme Court is a misnomer, for actually it is a court of unlimited original jurisdiction, similar in that respect to the Superior or Circuit Courts in most other states. The Court of Appeals is the supreme court of the state.

Before a candidate for admission may be admitted, he is required to satisfy the court that he is a person of character and fitness sufficient to entitle him to engage in the practice of law. This phase is referred to a committee of lawyers appointed by the court. Under the rules of the committee a questionnaire is furnished the applicant to be filled out by him. In addition, the names of the candidates are published in the New York Law Journal, a daily newspaper, which is the official legal publication, with a request that anyone having information of any candidate, communicate it to the committee.

Petitioner filed the questionnaire with the committee. Several hearings were had before a subcommittee of three of its members. In October, 1938, the Committee filed a report with the Appellate Division that it is not satisfied that he possessed the character and general fitness

requisite for an attorney and counsellor at law as is provided by Section 88 of the Judiciary Law of New York, without stating the reasons for its decision. The Appellate Division denied admission.

Petitioner, ever since, has tried, by repeated applications to be admitted to the Bar, but without success.

The repeated applications, over a period of almost a quarter of a century, were always denied by the courts unanimously and without opinion—not even by a two-line memorandum. The decision of the Court of Appeals, now sought to be reviewed by this court, was without opinion. In the case of each of his applications, a copy of his motion papers was served on the Committee on Character and Fitness, but in none of the applications did the Committee appear, either by service of an answer or by a personal appearance by a member or by counsel. It treated the applications with silent contempt. Since no reason was given for the repeated denials for admission, petitioner surmises and believes that two communications in writing from two lawyers was the cause. The names of the lawyers are Leo M. Wieder and James Dempsey. Petitioner does not know whether the complaints were in affidavit form or merely letters, for though told of them, he was not permitted to see or read them.

Neither of the lawyers was required to appear before the Committee to confront the petitioner, to be sworn as witnesses, where they could be subjected to cross-examination by petitioner or his counsel, in a formal judicial hearing, conducted in accordance with common law procedure and rules of evidence. The Committee apparently deems itself, not an agent or arm of a court but as an administrative agency of the Executive branch of the government, which sometimes processes matters before it by *fiat*.

There are two issues of fact to be determined by the Appellate Division in favor of the applicant for admis-

sion to the Bar, followed by the entry of a decree admitting him to the Bar. The proceeding for admission is a special proceeding, in nowise different from any other special proceeding, where a formal trial or hearing is had, where in accordance with common law trial and procedure, it terminates in a formal order or decree. There are two issues of fact in a proceeding for admission to the Bar, one, knowledge of law, and two, character and fitness. Knowledge of law is proven by the certificate of the Board of Law Examiners. The issue of character and fitness is, in New York, referred to its Committee on Character and Fitness, where it is not processed as an issue of fact. It is apparent that the courts in New York proceed on the rule, long prevalent, that membership in the Bar is a privilege, and not a right. Had the petitioner been accorded a formal trial of the issue of character, the two written communications would have been inadmissible as evidence and disregarded. Facts can only be found on competent evidence, properly adduced from witnesses, who must confront the parties, be sworn and submit to cross-examination. An *ex parte* statement, oral or written, is not competent evidence, and a finding of fact based thereon is not a foundation upon which a decree can rest, and is a nullity.

Mr. Justice Harlan in his prevailing opinion in the recent case of *Cohen* v. *Hurley*, 366 U. S. 117, said "that a state may not arbitrarily refuse a person permission to practice law. That petitioner's numerous applications for admission to the Bar were treated arbitrarily and capriciously can hardly be questioned. The refusal of the Committee to appear in the proceeding is clear evidence of arbitrariness. It treated the applications, not as steps in a judicial proceeding, but as ministerial acts of an administrative agency of government.

Admission to and Membership in the Bar is Not a Mere Privilege But a Right

The general rule is that admission to and membership in the Bar is a mere privilege, revokable for any cause. Webster defines the word as "a right, immunity, benefit or advantage enjoyed by a person or a body of persons beyond the common advantage of other individuals". However, a privilege available to every one, may not be denied to anyone, except for sound legal reasons, proved by competent evidence.

Mr. Justice Black, in his dissenting opinion in *Cohen* v. *Hurley* (*supra*) said:

> "I can see no justification for the notion that membership in the Bar is a mere privilege conferred by the state and is therefore subject to withdrawal for the 'breach' of whatever vague and indefinite 'duties' of the courts and other lawyers may see fit in a case-by-case basis."

So far as our research discloses, the Supreme Court has hitherto refrained from interfering in cases involving questions of the right of admission to and membership in the Bar apparently on the theory that such matters are solely the province of the state courts. But the trend to accept jurisdiction has been unmistakable. The recent cases of *Koenigsberg* v. *State Bar of California*, 353 U. S. 252, and *Schwarer* v. *Board of Law Examiners*, 353 U. S. 232, clearly evidences it.

The Right to Admission to the Bar is Property

Courts could not adequately function without lawyers. They are a part of the judicial system. Hence, the state invites persons who possess a certain amount of academic education to engage in the study of law, and impliedly promises and agrees that if the person who accepts the

invitation, passes the bar examination and is of good moral character, he will be licensed to practice law as a profession. The candidate for admission spends three or four years in law school, pays tuition fees, buys books and necessarily is compelled to refrain from engaging in remunerative employment during the period of study, has created a thing of material value, an asset or property. The asset loses all its value when a committee of lawyers holds that he lacks good moral character. Mr. Justice Black in his opinion in the *Koenigsberg* case, discussing the subject of character, said:

> "The term 'good moral character' has been long used as a qualification for membership in the Bar, and has served a useful service in this respect. However, the term itself is unusually ambiguous. It can be defined in an almost unlimited number of ways, for any definition will necessarily reflect the attitudes, experiences and prejudices of the definer. Such a vague qualification, which is easily adopted to fit personal views and predilections can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."

Confrontation

The right to an accused to confront his accuser is a right so elemental that citation of authority is unnecessary. It is a constitutional right which antedates Magna Carta, for, without it, cross-examination cannot be had, and a denial of cross-examination is a denial of due process. Petitioner has been deprived of his property by confiscation.

Conclusion

The issue here is the right of confrontation, and whether a denial of it, is a violation of petitioner's rights under the Fifth and Fourteenth Amendments of the Federal Constitution. The Court of Appeals virtually presented the question to this court when it amended the remittitur. It is a question of broad, general interest to every law student in the nation. So far as research discloses, the right of confrontation in a case of this kind has never been passed upon.

The writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted;

HENRY WALDMAN,
Attorney for Petitioner,
5 Beekman Street,
New York 38, New York.

HENRY WALDMAN,
of Counsel.

APPENDIX A

Order of New York Court of Appeals Granting Motion to Amend the Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of April A. D. 1962.

Present:

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 331

In the Matter of the Application of

NATHAN WILLNER,

Appellant,

for an Order Permitting him to file his application for admission to the Bar,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL DEPARTMENT,

Respondent.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Con-

stitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights.

And the Appellate Division of the Supreme Court, First Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

(Seal)

Gearon Kimball,
Deputy Clerk.

APPENDIX B

Amended Remittitur

No. 113

In the Matter of the Application of

NATHAN WILLNER,

Appellant,

for an Order Permitting him to file his application for admission to the Bar,

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL DEPARTMENT,

Respondent.

BE IT REMEMBERED, That on the 9th day of March in the year of our Lord one thousand nine hundred and sixty-two, Nathan Willner, the appellant in this cause, came here unto the Court of Appeals, by Henry Waldman, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Committee on Character and Fitness, First Judicial Department, the respondent in said cause, for whom there was no appearance.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry Waldman, of counsel for the appellant, no appearance for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is

affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily upon a question under the Constitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 140

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Respondent
80 Centre Street
New York 13, N. Y.

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
Of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 995

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Committee on Character and Fitness, Appellate Division of the Supreme Court of the State of New York, First Judicial Department, opposes the granting of the petition for certiorari.

The Opinion Below

The New York Court of Appeals wrote no opinion. 11 N. Y. 2d 866. The Appellate Division, First Department, wrote no opinion. 13 A. D. 2d 956.

Jurisdiction

The jurisdiction of this Court is invoked by the petitioner (Br., p. 2) under Title 28, United States Code, § 1257, subdivision 3.

The Question Presented

The question which petitioner seeks to present is whether, more than 21 years after he had been first denied admission to membership on the New York Bar by reason of the Committee's refusal to report in accordance with New York Judiciary Law, § 90 (then § 88), that it was satisfied that he "possesses the character and fitness required for an attorney and counsellor-at-law", he is entitled to assert that the Committee's action was taken arbitrarily and without regard to due process requirements.

The question is narrowed considerably since the record does not show: that the petitioner, within the period required by New York Civil Practice Act, Article 78, § 1286, began proceedings to review the Committee's original determination; or that in his appearances then before the Committee, or otherwise, the petitioner had asked that he be "confronted" by the persons he now labels as his accusers; or that he was then denied any information by the Committee about such charges. (See the Brief filed by the New York Attorney General in opposition to the petitioner's 1955 petition for certiorari.)

Moreover, the order sought to be reviewed merely denies petitioner an opportunity to *renew* his application for admission.

Prior Judicial History

Certiorari was denied to this petitioner in 1955 (348 U. S. 955), after the New York Court of Appeals (307 N. Y. 943, rearg. den. 307 N. Y. 944), had denied him leave to appeal from a First Department order (283 App. Div. 871), which had previously denied petitioner permision to file an application *de novo* for admission to the Bar.

Statement

(1)

In February, 1937 petitioner filed with the Committee his completed questionnaire. On three separate occasions between April 4, 1937 and October 31, 1938, he was examined by the Committee. On October 31, 1938, the Committee reported unanimously, through its ten members, that it could not certify that petitioner possessed the requisite character and fitness for admission to the Bar.

Between November, 1939 and February, 1948, the Appellate Division, First Department, denied six motions made by the petitioner seeking reconsideration of his application by the Committee.

On February 9, 1948, the Appellate Division granted petitioner's motion for reconsideration. It referred the matter to the Committee for a rehearing. Petitioner then appeared before the Committee on two separate occasions. On June 19, 1950, all ten members of the Committee signed a report adhering to the determination made in the Committee's 1938 report.

On May 18, 1954, the Appellate Division entered an order resettling an order of April 17, 1954 denying permission to the petitioner to file his application *de novo*. It also formally denied his application for admission to the Bar. This was done at petitioner's request so that he could apply to the Court of Appeals from such order of denial.

The New York Court of Appeals, when it denied leave to appeal had before it all papers filed with the Appellate Division. See 307 N. Y. 943, 944. Then this Court denied certiorari (348 U. S. 955).

(2)

On November 1, 1960, the Appellate Division denied petitioner's further application for admission *de novo* (12 A. D. 2d 452).

(3)

On June 29, 1961, the Appellate Division denied petitioner's application for leave to file an application for admission pursuant to Rule 1(e) of the Rules of Civil Practice (13 A. D. 2d 956). That Rule requires an applicant who previously has failed to receive a certificate of good character, to obtain the Appellate Division's written consent to renewal of his application for admission in that or any other Appellate Division.

On September 21, 1961, the Appellate Division denied leave to the petitioner to appeal from its June 29, 1961 order (14 A. D. 2d 672). On January 23, 1962, the Court of Appeals granted leave to appeal from such order. On April 5, 1962, the Court of Appeals affirmed the June 29, 1961 order appealed from (11 N. Y. 2d 866). On April 26, 1962, the Court of Appeals amended its remittitur to indicate: that it had passed upon the constitutional questions petitioner presented and that it had held that he had not been denied due process (Pet. Appendix A).

ARGUMENT

No substantial federal question is presented by the petition. It should be denied, particularly since the petitioner is again seeking to renew an application for admission to the New York Bar, this Court having previously refused to review, by certiorari, a prior denial of an application by petitioner to renew his application for such admission.

Since this Court refused to grant certiorari to review a similar ruling by the New York Courts in 1955, we do not assume that it will now act differently.

The only argument urged by the petitioner for now granting certiorari is that the decisions by this Court in *Koenigsberg* v. *State Bar*, 353 U. S. 252 (1956) and in

Cohen v. *Hurley*, 366 U. S. 117 (1960), indicate that he was deprived of due process in not being afforded an opportunity to confront persons who, he alleges, furnished information to the Committee which led to the rejection of his original application for admission.

The record does not indicate that he preserved, by request or objection, the right to urge any such deprivation of constitutional right or that the Committee's determination rested upon such information. Nor do the cases cited by petitioner hold that he was constitutionally entitled to confrontation of such witnesses before the Committee.

In the first *Koenigsberg* case (*supra*), this Court found that there had been a denial of due process because the evidence before the California committee did not rationally support the two grounds upon which that committee had relied in rejecting Koenigsberg's application for admission (353 U. S. 252, 262). In *Cohen* v. *Hurley*, *supra*, this Court held that disbarment of an attorney, by reason of his refusal to cooperate in a State court's efforts to explore unethical conduct, and without any independent evidence of wrongdoing on his part, was not irrational or arbitrary, and did not deprive him of due process of law, contrary to the Fourteenth Amendment. Both cases stem from the "undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law" (366 U. S. 117, 122-123).

But the petitioner's record in this case contains no basis for labeling the Committee's action in 1938 and 1950 as arbitrary in refusing to certify petitioner's character. Nor does the refusal of the New York Courts to permit the petitioner to renew his application for admission present any federal question.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, N. Y., June 1, 1962.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York
Attorney for the Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1961

No. ~~995~~ 1170

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF

HENRY WALDMAN,
Attorney for Petitioner.

HENRY WALDMAN,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1961

No. 995

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF

It is apparent that respondent's position is; Petitioner, having been denied admission the first time he applied, in 1936, and his subsequent applications having been similarly denied, the denial of the instant application is justified. Which reminds us of the famous army general who came to a social gathering in uniform, his chest covered with medals To an inquiry how he had been awarded all the medals, he said: "The first one I received by mistake and the others because of the first".

Under the heading "STATEMENT" (br. p. 3), respondent says: "On October 31, 1938, the Committee reported *unanimously, through its ten members* that it could not certify that petitioner possessed the requisite character and fitness for admission to the Bar" (Italics ours).

The interviews or conferences with applicants for admission are not conducted by the entire Committee, but by sub-committees, sometimes, of three members, usually of one. The sub-committee reports its recommendation to the whole body, which almost invariably rubber stamps its approval.

Since the reason for rejection was never disclosed to petitioner, we may be pardoned for surmising or guessing. It could be that he showed resentment at some of the questions and made sharp answers, which nettled the inquirer, or resentment of the fact that he, a certified public accountant, should seek to enter the legal profession. There are lawyers who believe that the legal profession should be open only to gentlemen. They define a gentleman as one who can trace his ancestry to William of Normandy or one of his robber barons, or to one of the barons who coerced King John to signing Magna Carta, or at least is a Mayflower descendent. In other words, a social club, which can reject a person for membership by a number of black balls, without any reason required to be given by those who dropped them in the box.

Federal Questions Are Involved

Respondent contends (br. p. 3) that no Federal question is involved, and further, that our prior application for *certiorari* having been denied, our present application should be denied. It makes no claim that that the prior decision is *res judicata*. It has been repeatedly pointed out by many learned judges and eminent jurists, that the law is not a certain science like mathematics, but changes constantly, due to changes in the mores of the community, and economic and social changes. Law is pragmatic. The policy of the Supreme Court until comparatively recently was to refuse to take jurisdiction of matters deemed solely the concern of the states. We cited *Cohen* v. *Hurley*, *Koeningsberg* v. *State Bar and Schwerer* v. *Board of Law Examiners* to point out that this Court had taken jurisdiction in matters involving the right to practice law. Just as no two human faces are exactly alike, so no two law suits are exactly identical in the facts involved. Hence, the differences in the facts in the case at bar and in the cases cited are not material.

This Proceeding Is a Battle for Human Rights

Though *coram nobis* is invoked only in criminal cases, it could well apply to this proceeding, which, after all, is one to right a wrong. So far as the record shows, the petitioner was entitled to admission to the Bar when he first applied. The report of the Character Committee was absolutely valueless, since it was based on *ex parte* statements or for reasons unknown to petitioner, for no reason was ever disclosed to him. He has tried for almost a quarter of a century to gain admission, but the Committee has coldly ignored his efforts, refusing to appear in any of the proceedings, a course of conduct tolerated by the local courts. Since no opinion or memorandum was ever handed down by any court, he is still unaware of the reasons for his rejection.

As pointed out in his petition to the Appellate Division, the report of the Committee that he was unfit to be a lawyer, affected adversely his practice as a Certified Public Accountant, for a cautious business man will hesitate to entrust the custody of his records for audit to one deemed unfit, because of lack of good character to be a member of the Bar. In a sense, his position is no better than that of an ex convict. Even time has not erased the smudge of rejection.

It is respectfully urged that the application for a writ of *certiorari* be granted.

Respectfully submitted,

HENRY WALDMAN,
Attorney for Petitioner.

HENRY WALDMAN,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 140

NATHAN WILLNER,

Petitioner-Appellant,

against

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

CROSS-MOTION TO DISMISS

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
Attorney for Respondent-Appellee,
Office & P. O. Address,
80 Centre Street,
New York 13, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 140

Cross-Motion to Dismiss.

NATHAN WILLNER,

Petitioner-Appellant,

against

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

SIRS:

PLEASE TAKE NOTICE, that on the affidavit of Daniel M. Cohen, Assistant Attorney General of the State of New York, verified October 10, 1962, the respondent will cross-move this Court on the 12th day of October, 1962 at its Courthouse in the City of Washington, D. C. for an order

dismissing the appeal taken herein by the petitioner upon the ground that certiorari was granted improvidently herein.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Respondent-Appellee,
Office & P. O. Address,
80 Centre Street,
New York 13, New York.

To:

HON. JOHN F. DAVIS,
Clerk,
United States Supreme Court,
United States Supreme Court House,
Washington 25, D. C.

HENRY WALDMAN, Esq.,
Attorney for Petitioner-Appellant,
5 Beekman Street,
New York 38, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 140

Affidavit.

NATHAN WILLNER,

Petitioner-Appellant,

against

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL M. COHEN, being duly sworn deposes and says:

1. He is an Assistant Attorney General of the State of New York and has been assigned to the defense of the appeal taken to the United States Supreme Court by the petitioner-appellant herein.

2. This affidavit is made in support of a motion to dismiss the appeal taken herein upon the ground that facts which came to the attention of the deponent *after* the date when certiorari was granted seem to indicate that certiorari was granted improvidently.

A.

3. It was not until after certiorari had been granted that deponent ascertained that *no* record or transcript of the proceedings in the New York courts had been filed by the petitioner in connection with this petition for certiorari.

4. Apparently petitioner made no effort to supply even the Court with the certified copy of a transcript of the record which is required by Rule 21 of the Rules of this Court.

5. Deponent had no knowledge at the time the brief in opposition to certiorari was filed of the facts of this case except as those facts were set forth in the brief in opposition to certiorari, for the reason that the Attorney General's office was not requested by the New York Appellate Division to appear in this matter until after the service of the petitioner's application for certiorari and the Attorney General was supplied by the Appellate Division with only the summary of facts set forth in said brief.

6. Until then, the proceedings, which had not been of an adversary nature, were purely judicial. Even upon the appeal to the Court of Appeals of the State of New York, the Appellate Division of New York's Supreme Court simply transmitted its complete file in the case to the Court of Appeals (Cross-Desig., Item 94). Oral argument in the New York Court of Appeals by the petitioner's counsel was completely unopposed (11 N. Y. 2d 956; and see Appendix B to the Petition for Certiorari).

B.

7. *After* this Court granted certiorari, the Appellate Division file in the case was made available to the deponent. Examination of this file by deponent disclosed that there had been *no testimony by complainants* against

the petitioner at any of the hearings of the Character Committee at any time. The only testimony given before the Committee in 1937 and 1938 in connection with the petitioner's original application for admission to the New York Bar had been given by the petitioner and by his wife, both of whom testified in favor of his application. The Character Committee report in connection with such application indicates that at least in part the petitioner's application was denied by reason of his failure to reply to questions affecting his character with appropriate *candor*. Letters of complaint against the petitioner had been received by the Committee, but by reason of *admissions* made by the petitioner and by reason of his lack of candor with the Committee, the Committee apparently never deemed it necessary to summon the complainants as witnesses. *Denial of the petitioner's 1937 application for admission to the Bar was predicated upon the record which the deponent himself had made before the Committee.*

8. In any event, whatever possible constitutional quarrel the petitioner may have had with the disposition of his 1937 application would appear to have been dissipated by reason of the fact that *in 1948 he was permitted to file a new application for admission to the Bar.* The Character Committee rejected this application, too, and again refused to certify that it was satisfied with his character. One reason for such dissatisfaction appears to have been the petitioner's failure to supply information requested by the Committee, particularly with relation to a complaint that he had *testified falsely* in a civil action concerning an issue as to whether he was an active member of a Certified Public Accountants' society. This issue was not a political issue and did not concern any issue of freedom of association or the right to be a member of the professional society. The issue before the Character Committee was simply one as to whether the petitioner had testified fasely or truthfully as to the fact of his paid-up membership.

The petitioner appears to have been apprised of this issue at the hearings at which he testified personally in 1948 and he appears to have *admitted* that he was not then a member of the professional society in which he had testified he was a member.

9. In connection with the Committee's 1948 action, it also appears that consideration was given to vituperative letters written by the applicant, Willner, to numerous persons concerning the Character Committee and its members. Willner *admitted* before the Committee that he had written the letters.

10. The entire file of the Appellate Division was transmitted to the New York Court of Appeals in connection with the petitioner's 1962 appeal to the Court of Appeals. There appear to have been included in this file all of the papers which have been listed in the amended cross-designation dated October 5, 1962 filed with the Clerk of this Court.

C.

11. The attorney for the petitioner was informed by the deponent on October 2, 1962 by telephone that the deponent intended to prepare and file with this Court an amended cross-designation which would specify all of the papers which had been considered by the Appellate Division and that had been transmitted to the Court of Appeals of the State of New York. The cross-designation was served by mail on October 5, 1962. It contains 96 items including an item (94) which discloses that the entire Appellate Division file in connection with the petitioner's applications for admission to the New York Bar was transmitted to the Court of Appeals pursuant to the request of the Clerk of the New York Court of Appeals "to assist the Court of Appeals in deciding the appeal taken by Willner".

12. On October 5, after the cross-designation had been served by the Attorney General by mail, there was received at the office of the Attorney General a motion by the petitioner to compel the Clerk of this Court to print solely the papers specified in the petitioner's "designation". These papers apparently relate solely to petitioner's application for leave to renew his application for admission to the Bar pursuant to Rule I of the New York Rules of Practice. Obviously, such papers alone would not constitute a fair representation of the record upon which that application for leave to renew was disposed of by the Court of Appeals when as a matter of fact the Court of Appeals had had before it the complete file of the Appellate Division.

13. Deponent respectfully requests that this affidavit be considered not only in support of the respondent's motion to dismiss this appeal, but also in opposition to the petitioner's motion to require the Clerk to print the record including *only* those papers which had been furnished and designated by the petitioner. The record in the possession of the Clerk of this Court upon which the petitioner seeks to proceed is incomplete.

14. Deponent has requested the Clerk of the Appellate Division, First Department to transmit to the Clerk of this Court without delay the same complete file which had previously been transmitted to the Clerk of the Court of Appeals of the State of New York. The Appellate Division Clerk has assured deponent this will be done. Deponent respectfully submits that a careful examination of this file will disclose that there was *an adequate State basis* for the denial of the petitioner's motion for leave to renew his application for admission to the Bar. It will disclose, too, that after the alleged unconstitutional rejection of his original application for admission to the New York Bar, New York afforded the petitioner a complete review by granting him an opportunity to re-

apply in 1948. At that time his application appears to have been denied, not by reason of any *ex parte* complaints, but by reason of his own admissions before the Committee, his own misconduct in issuing unrestrained and vitriolic letters concerning Committee members and by reason of his failure to supply information to the Committee concerning his status as a member of a society of professional accountants. Although the prior *history* of the petitioner's applications was referred to in the Committee's 1948 report he had, nevertheless, been granted a rehearing and the basis for petitioner's rejection appears to have been the petitioner's own misconduct in several capacities: as a writer of incontinent letters; as a witness who testified in civil actions without regard to factual accuracy; and as a witness before the Character Committee who dealt with the Committee without appropriate candor or respect for its requests for appropriate and pertinent information.

D.

15. The petitioner-appellant *appeared in person* before sub-committees of the Committee on Character and Fitness of the Appellate Division of the New York Supreme Court on several occasions. The Committee members were able to observe the petitioner's demeanor and to judge his credibility as a witness. Presumably, they also performed their functions as judges of his character. The New York courts have had before them, in their consideration of the petitioner's application for leave to renew his prior application for admission to the Bar, the entire history of this case. *The petition for certiorari was submitted to this Court, however, solely upon the basis of conjecture and surmise* (Petition, p. 4). With the entire file in this case now before this Court, as it was before the New York Courts, we respectfully submit that reconsideration should be had by the Court of its allowance of certiorari.

WHEREFORE, deponent prays for an order vacating and setting aside the prior order of this Court granting certiorari and further directing that the appeal taken herein be dismissed upon the ground that certiorari was improvidently granted.

DANIEL M. COHEN,
Assistant Attorney General
of the State of New York.

Sworn to before me this
10th day of October, 1962.

SAMUEL A. HIRSHOWITZ,
First Assistant Attorney General
of the State of New York.

IN THE

Supreme Court of the United States

October Term, 1962

No. 140

NATHAN WILLNER,

Petitioner-Appellant,

—v—

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT, IN OPPOSITION TO MOTION TO DISMISS

HENRY WALDMAN,
Attorney for Petitioner-Appellant,
5 Beekman Street,
New York, N. Y.

HENRY WALDMAN,
LESTER J. WALDMAN,
of Counsel.

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IN THE

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Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT, IN OPPOSITION TO MOTION TO DISMISS

Counsel for petitioner-appellant, who is writing this brief, has been practicing law, actively and continuously, for more than sixty years. Over those years, he has opposed thousands of motions—a large number of them, absurd and without merit, but not one, as absurd and lacking merit as the one at Bar.

Since the motion is based on Mr. Cohen's moving affidavit, we deem it proper to treat it as a formal brief. Mr. Cohen is an assistant attorney general of the State of New York, and in charge of the case.

Our petition for certiorari was based solely on the fact that Willner was denied the right to confront his accusers, and therefore denied the right to cross examine them, and thereby denied a fair trial—in fact, any sort of a trial. By reason of which, his constitutional rights under the Fifth and Fourteenth Amendments of the Federal Constitution were violated. Mr. Cohen does not deny that confrontation was denied and nowhere in his affidavit does he offer any

reason or argument for the denial, but bases his motion on the omission of a transcript, which at most was a trivial technical omission, not material or relevant to the constitutional question of the right of confrontation.

So, Mr. Cohen, about three and a half months after certiorari was issued seized on the fact that we failed to file a transcript of the record of the case, as required by Rule 21 of the Rules of the Supreme Court.

It has been counsel's experience over the years of law practice that papers to be submitted to a court or judge are first handed to the clerk of the court, whose duty it is to examine it carefully, and if his eagle eye discovers the slightest defect or omission, to hand them back for correction. We assume that our petition for certiorari received the same treatment at the clerk's office of this court, and was deemed flawless. We may also assume that the justices of the court deemed the petition sufficient, otherwise they would not have granted the writ.

The petition was verified by Willner. It relates the basic facts, and if consideration to the substitutes for a transcript in Rule 21 is given, a transcript was wholly unnecessary.

Had the clerk or the justices required a transcript, we would have willingly furnished it.

Subsequent to the issue of certiorari, we prepared and filed in the office of the clerk of this court a certified copy of every paper in the record of the proceeding, from the petition to the Appellate Division which initiated it, to the final order of the Court of Appeals which affirmed the order of the Appellate Division denying Willner's petition. True, they were filed after certiorari was granted, but what actual material difference does that make?

POINT I

The cross motion to dismiss was made more than three months after issue of certiorari. The respondent-appellee is guilty of laches.

Mr. Cohen (p. 4) says:

> "It was not until certiorari had been granted that deponent ascertained that no record or transcript of the proceedings in the New York courts had been filed by the petitioner in connection with the petition for certiorari."

Mr. Cohen is a member of the Supreme Court Bar, and is presumed to be familiar with its rules and practice. Why did he fail to discover our alleged failure to comply with Rule 21 until more than three months after certiorari had been granted? His explanation is like that of a small boy for the low marks on his school report card—wavering, quivering and not convincing—in fact, no excuse at all.

POINT II

Appellee filed a brief in opposition to the grant of certiorari, but did not object for alleged omission to file transcript. Hence it must be deemed to have waived it.

In the Committee's brief filed in opposition to our petition for certiorari, there is no mention of the transcript of the record and of our omission to file it. Had the objection been raised in the brief, we could have applied to the court for leave to file it, *nunc pro tunc*, as of the date of the filing of our petition, which we believe would have been granted. In view of the laches (our Point I) and the fact that the complete record is now on file in the clerk's office, leave to deem the transcript filed as of the date of the filing of the petition could well be granted now, *and we respectfully request the court to do so.*

POINT III

Matter in appellee's brief which has no relevancy to the ground on which it bases its cross motion for dismissal, should be wholly disregarded.

Mr. Cohen on page 5 of his affidavit relates an incident which has no bearing or relevancy to the failure to comply with Rule 21. The purpose—to create prejudice against Willner, Mr. Cohen states that in a civil action Willner testified falsely that he was an active member of a Certified Public Accountants Society. A brief is not an affidavit, but we ask the Court to treat Willner's explanation of the incident as though under oath. It is:

He had been licensed as a Certified Public Accountant by the State of New York on January 1, 1937. He had joined the New York State Society of Certified Public Accountants. This was in the depth of the Depression in the Thirties. He was a beginner. He was married, and in addition to the burden of supporting his family, he contributed to the support of his aged parents. So, he fell behind in payments of his dues, and he was dropped as a member. In that period, members of the most exclusive social clubs experienced similar treatment. Willner knew that he could be restored to membership when he would be in a financial position to pay up, and in fact he was restored to membership in 1951, and also was made a member of the American Institute of Accountants, the recognized national organization of the accounting profession. The action which gave rise to his testimony was an embezzlement charge where he (Willner) had unearthed the syphoning off of the funds of a firm by officers. The court held that Willner's testimony was true and his side won the case. The assertion about Willner came subsequently, he was reinstated to membership and after a member of the Society, a Mr. Rieck, a member of the accounting firm of Haskin & Sells, had signed a statement to the effect that

reinstatement was acceptable and sent Willner a letter confirming it.

But, after all, what has all this to do with the motion to dismiss? All of the matter dragged in his moving affidavit, to quote Gilbert & Sullivan "has nothing to do with the case".

POINT IV

The amended remittitur by the Court of Appeals squarely presents to the Supreme Court the question of the right to confrontation of accusers of a candidate for admission to a state bar.

The pertinent part of the remittitur order reads:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights."

This court has held "that the state may not arbitrarily refuse a person permission to practice law." And it is patently clear that New York has arbitrarily refused Willner admission to the Bar, when it held that refusal of confrontation was not a denial of his constitutional right of due process.

The right of confrontation is a right accorded to every person under an accusation, civil or criminal. A habitual criminal, accused of the commission of an atrocious crime may not be denied the right to confront the witnesses against him. An accepted and recognized right even before the invention of writing. A denial of the right in the twentieth century is an anachronism.

Conclusion

Willner was entitled to admission to the Bar, when he first applied, in 1937. He has been denied admission for a quarter of a century, suffering aggravation, humiliation and financial losses over the years. His family has suffered, as well. To indulge in a colloquialism, "he has been given a raw deal". He is now on the shady side of life, 61, and in the interests of justice, admission to the Bar should not be delayed, but directed forthwith.

Respectfully submitted,

HENRY WALDMAN,
Attorney for Petitioner-Appellant.

HENRY WALDMAN,
LESTER J. WALDMAN,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1962

No. 140

NATHAN WILLNER

Petitioner-Appellant,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT

HENRY WALDMAN,
Attorney for Appellant.

HENRY WALDMAN,
LESTER J. WALDMAN,
of Counsel.

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IN THE

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NATHAN WILLNER,

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COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent-Appellee.

BRIEF OF PETITIONER-APPELLANT

Preliminary Statement

The petitioner-appellant, Nathan Willner, pursuant to permission to appeal by virtue of the issuance by this Court of its Writ of Certiorari, directed to the Court of Appeals of the State of New York, has appealed from the final order or remittitur of the said Court of Appeals, as well as from the amended remittitur of said Court, which denied said Willner's application for admission to the Bar of the State of New York.

The order of the Court of Appeals was without opinion. Willner then moved in the Court of Appeals for amendment of its final order or remittitur to the effect that he had raised the claim that his rights under the Fifth and Four-

teenth Amendments of the Constitution of the United States had been violated.

The motion was granted, and the remittitur amended, so as to read:

> "Upon the appeal herein, there was presented and necessarily passed upon the question under the Constitution of the United States, viz: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights." (Tr. f. 34)

Willner then moved before this Court for the issuance of its Writ of Certiorari, directed to the said Court of Appeals. His petition was granted and the Writ issued (Tr. f. 37).

The respondent-appellee appeared by the Attorney General of the State of New York as its attorney, and filed a brief in opposition to Willner's petition for Certiorari. After the grant of certiorari, disputes arose between counsel with respect to what the printed Transcript of Record should contain. Willner had applied for admission to the Bar immediately after he passed the bar examination—about a quarter of a century ago. The denial of admission was followed by renewals, which were invariably denied. Respondent filed a demand that its 96 items "Amended Designation", be made the record. It finally agreed to waive the printing of that mass of material. At the same time, it made a "Cross Motion to Dismiss"—the complaint—that is to vacate the Writ of Certiorari. The motion was denied. The way is now cleared for the disposition of the proceeding on its merits.

The Facts

The facts are fully related by Willner in his petition to the Appellate Division of the Supreme Court of New York, which initiated this proceeding, and is printed in full in the Transcript of Record, headed: "PETITION TO FILE APPLICATION FOR ADMISSION TO THE BAR" (pp. 2-12 incl., fols. 1-14 incl.), and requires no repetition.

Argument

Willner was denied admission to the Bar in 1937, solely on the report of the Committee that it was not "satisfied and cannot certify that the applicant possesses the character and general fitness, requisite for an attorney and counselor at law, as provided by Section 88 of the Judiciary Law", without stating the facts and reasons upon which it based its recommendation; since then all subsequent applications and proceedings were similarly treated. There has never been even a one sentence memorandum. To this day he does not know the reason or reasons for branding him unfit to be a member of the Bar.

In our petition for Certiorari, we quoted from Mr. Justice Harlan's opinion in *Hurley* v. *Cohen*, 326 U. S. p. 117, that "a state may not arbitrarily refuse a person permission to practice law." We deem this the promulgation of a new policy by the Court, and now the supreme law of the land. Heretofore, our research discloses, the Court refused to take jurisdiction, on the ground that Bar membership was exclusively the business of the state and not subject to the interference of the Federal Government. However, in the *Hurley* case (*supra*) and in *Koenigsberg* v. *State Bar of California*, 253 U. S. 253 and *Schwarer* v. *Board of Law Examiners*, 353 U. S. 232, the Court assumed jurisdiction, even to the extent of delving into the merits of each case.

We assume that the Court, in granting certiorari, did so on one or two grounds, or on both. One is the ground that the Committee acted arbitrarily in reporting that Willner was not fit to be admitted to the Bar, because of lack of good character; the second is that he was entitled to be confronted by the lawyers, Wieder and Dempsey, whose complaints and charges, the Committee had evidently taken very seriously, and upon which it apparently had based its determination of lack of good character.

Our argument will, therefore, be limited to those two issues.

I.

A state may not arbitrarily refuse a person permission to practice law.

The action of the Committee in denying Willner admission to the Bar, was so without cause or reason as to merit the label "arbitrary." Willner had spent four years in the School of Commerce of New York University and was awarded the degree of Bachelor of Commercial Science, then four years in the Law School of New York University which awarded him the degrees of Bachelor of Laws and Master of Laws. He passed the Bar examination; was a member in good standing of the profession of Certified Public Accountants, was married, living with his wife and two children. The denial of admission, without vouching a reason indicates very clearly that the New York courts deem admission and membership in the Bar a privilege, pure and simple, granted by the Sovereign which it has the right and power to deny or to rescind, at its pleasure.

Bar Membership, is a Right, Not a Privilege

Neither the courts nor the citizens nor the business community can function adequately without lawyers. Thus, the state invites all persons with the proper academic

training, to engage in the study of law, and impliedly promises and agrees that one who so engages in the study of law for the prescribed length of time; has successfully passed the required Bar examination and is of good character and fitness, will be licensed by the state to practice law, as his profession. Since preparation for the Bar consumes time, labor, tuition fees and incidental expenses, it is an asset—not tangible, it is true, but property in the real sense of the word. An application for admission to the Bar is a judicial special proceeding, is no wise different from any other proceeding. The applicant is the petitioner and he is required to prove two issues, his knowledge of law and his good character, his law knowledge is established by the certificate issued by the Board of Law Examiners, and his character and fitness by the report of the Committee on Character and Fitness to the Appellate Division. Where, as here, the decision is adverse, the asset is made worthless.

What is good character? As pointed out by Mr. Justice Black, the words are ambiguous. Quoting from his opinion in the *Koenigsberger* case (*supra*):

> "The term 'good moral character' has been long used as a qualification for membership in the Bar, and has served as a useful service in this respect. However, the term itself is unusually ambiguous. It can be defined in an almost unlimited number of ways, for any definition will necessarily reflect the attitudes, experiences and prejudices of the definer. Such a vague qualification, which is easily adapted to the personal views and predilictions can be a dangerous instrument for arbitrary discriminatory denial of the right to practice law."

Willner's character and fitness were determined by three persons, Messrs. Stroock, O'Connor and Ellison. Their decision was questionably based on the *ex parte* charges made by the lawyers, Wiedner and Dempsey. Can there be any doubt that Willner was "arbitrarily" denied permission to practice law?

II.

The right of one accused to be confronted by his accusers, have them sworn, and subject them to cross-examination, in a formal trial or hearing, conducted in accord with common law rules of evidence and court procedure, is so elemental, as not to require citation of authority.

The right of confrontation is a basic right of every person under an accusation, civil or criminal. An habitual criminal, accused of the commission of an atrocious crime may not be denied the right to confront the witnesses against him. This is a right recognized and accepted even in barbarous tribal society.

The right to confrontation and cross-examination was dramatically defined by President Dwight D. Eisenhower in a public address by these words:

> "I was raised in a little town most of you have never heard * * * called Abiline, Kansas. Now that town had a code and I was raised as a boy to prize that code. It was: Meet anyone face to face with whom you disagree * * * in this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate your character from behind * * *."

The real reason for the right of confrontation is precisely that. No man should be assassinated, in person or in his good name, from behind.

CONCLUSION

The appellant was entitled to admission when he first applied. He is entitled to admission now. The order appealed from should be reversed and his admission directed forthwith.

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HENRY WALDMAN,
LESTER J. WALDMAN,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 140

NATHAN WILLNER,

Appellant,

vs.

COMMITTEE ON CHARACTER and FITNESS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

Introduction

(1)

In May, 1961, the petitioner, Nathan Willner, whose *two prior applications* (one made in 1937 and the other in 1948) *for admission to the Bar of the State of New York* had been denied, applied to the Appellate Division of the New York Supreme Court, First Judicial Department, pursuant to Rule 1(e) of the New York Rules of Civil Practice "for an order, granting the petitioner *leave* to file his application for admission to the Bar of the State of New York" (R., p. 1, italics supplied).

The petitioner's previous applications for admission had been denied because the Committee on Character and Fitness (hereinafter called "The Committee") determined that it was "not satisfied and cannot certify that the applicant possesses the character and general fitness requisite for an attorney and counselor at law as provided by section 88 of the Judiciary Law" (R., p. 3).

On June 29, 1961, the Appellate Division denied the petitioner *leave* to file his application for admission to the Bar of the State of New York *de novo*, pursuant to Rule 1(c) of the New York Rules (R., p. 13).

The Appellate Division having denied the petitioner permission to *renew* his twice-denied application for admission to the New York Bar, the petitioner sought and on January 11, 1962 obtained leave from the New York Court of Appeals to appeal to that Court from the Appellate Division order (R., p. 23). The Court of Appeals, on April 5, 1962, affirmed the Appellate Division's discretionary order, even though the appeal was argued for the petitioner and no one appeared for the Character Committee (R., pp. 25-27). On April 26, 1962, the Court of Appeals granted petitioner's *unopposed* motion to amend its remittitur, by adding thereto a statement that upon the appeal to that Court, there was presented a question under the Constitution of the United States.

This Court, on June 25, 1962, granted Willner's petition for a writ of certiorari to the New York Court of Appeals and transferred this case to its summary calendar (R., p. 28; 370 U. S. 934). A motion made by the respondent to dismiss the writ was denied by this Court on November 13, 1962 (R., p. 29; 371 U. S. 900).

Decisions Below Without Opinion

No opinion was written by the New York Court of Appeals, upon its unanimous affirmance of the Appellate Division's denial of Willner's petition for leave to renew his

application for admission to the New York Bar. 11 N. Y. 2d 956. Nor had the Appellate Division, in unanimously denying his petition, written any opinion. 13 A. D. 2d 956.

New York Judiciary Law, § 90, subd. 1

The admission of attorneys and counsellors-at-law to practice as such in the courts of *New York* has been governed, even prior to the petitioner's first application for admission by New York Judiciary Law, § 90, subd. 1. The applicable portion of that subdivision now provides, in its paragraph "a":

> "Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if *it* shall be *satisfied* that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate division relating to the admission of attorneys." (Italics supplied)

For a half century, the first subdivision of § 90 has made it a prerequisite to admission that the *Appellate Division* be "satisfied" as to an applicant's "character and general fitness". L. 1912, ch. 253; formerly, Judiciary Law § 88. See L. 1871, ch. 486 § 3.

As to two of the four judicial departments of the State, which have functioned in its most densely populated areas, the same subdivision of Judiciary Law, § 90 has long taken cognizance of the fact that each of the Appellate Divisions of the Supreme Court, First and Second Departments, had

appointed a "committee on character and fitness * * * pursuant to the rules of civil practice." At present, the statute empowers each such committee with the written consent of a *majority* of the justices of its department, to "appoint and remove a secretary, stenographers and assistants, and procure a suitable office for each committee * * * for the proper performance of the duties of each committee" (Judiciary Law § 90, 1, d).

The Functions of the Character Committee

(1)

Rule 1 of the New York Rules of Civil Practice has, at least since 1921 empowered the Appellate Division in *each* Department to appoint a committee of not less than three practicing lawyers for each judicial district within its department,

> "which committee shall *investigate* the character and fitness of every applicant for admission to the bar" (Italics supplied).

The Rule required all applications for admission to the bar of persons residing within a district to be referred to "the committee for such district". It also provided that, unless otherwise ordered by the court (more recently modified to specify the court as the "Appellate Division"),

> "no person shall be admitted to the bar without a certificate from the proper committee that it has carefully *investigated* the character and fitness of the applicant and that, in such respects, he is entitled to admission" (Italics supplied).

(2)

Since 1921, Rule 1 has also authorized the committee "to prescribe a form of written *statement* of the applicant's experience, from which the committee may pass on his moral and general fitness" (Italics supplied).

The portion of the Rule referred to in the foregoing quotation was amended in 1950 to provide (Clevenger's Practice Manual, 1962 Annual, Rules of Civil Practice, Rule 1, d, in part):

> "To enable the committee to make such investigation the committee, subject to the approval of the Justices of the Appellate Division, is authorized to prescribe and from time to time to amend a form of *statement or questionnaire* on which the applicant shall set forth in his usual handwriting all the information and data required by the committee and the Appellate Division justices, including specifically his present and past places of actual residence (listing the street and number, if any) and the period of time he resided at each place." (Italics supplied)

The most recent revision (L. 1962, ch. 310) of the pertinent New York statutory provisions has preserved these requirements as to certification of character and as to the submission by an applicant of a statement or questionnaire. Rule 9404 of the New York Civil Practice Law and Rules (to become effective September 1, 1963) provides:

> "*Rule 9404. Certificate of character and fitness*
>
> Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth in his usual handwriting all the information and data required by the committee and the appellate division justices, including specifically his present and past

places of actual residence, listing the street and number, if any, and the period of time he resided at each place."

(3)

For some years, Rule 1 has also contained a provision in its subdivision "e", requiring the written consent of the Appellate Division to the *renewal* of an application for admission. Rule 1(e) has provided, at least since 1950, as follows:

> "(e) In the event that any applicant has made a prior application for admission to practice in this state or in any other jurisdiction, then upon said statement or questionnaire or in an accompanying signed statement, he shall set forth in detail all the facts with respect to such prior application and its disposition. If such prior application had been filed in any Appellate Division of this State and if the applicant failed to obtain a certificate of good character and fitness from the appropriate character committee or if for any reason such prior application was disapproved or rejected either by said committee or said Appellate Division, he shall obtain and submit the written consent of said Appellate Division to the renewal of his application in that Appellate Division or in any other Appellate Division."

(4)

The necessity, under New York law, for a certification by the committee of an applicant's character, was emphasized by the decision in *Matter of Peters*, 250 N. Y. 595 (1929), where admission to practice was denied to an applicant, who claimed that his disbarment in another state had been void, where a character committee reported his general good character apart from the implication flowing from disbarment, but *without* recommendation. The

New York Court of Appeals answered in the negative a question certified to it by the Third Department as to whether, upon such a report, the applicant was entitled "as a matter of right" to "admission to the Bar of this State" (250 N. Y. 595, 596). The Third Department had denied a motion to modify the report of its character committee (*supra*, p. 596).

Although *lack* of certification by the Committee would appear under New York law, to preclude admission as a *matter of right*, the New York Court of Appeals, upon review, has exercised its power to remit admission proceedings to the Appellate Division, where the Court of Appeals has found that denial of admission has been founded upon an insufficient basis. *Matter of Anonymous*, 10 N. Y. 2d 740 (1961).

Filing and Confidentiality of Papers Relating to Application

(1)

At least since 1921, the Clerk of each Appellate Division has been required to "file in his office all the papers presented and acted on by the court on each application for admission". The 1950 amendment of the Rule provided for such filing of every application "together with all the papers submitted thereon" upon its final disposition by the Appellate Division.

(2)

Judiciary Law § 90, has contained, among other provisions, a provision (subd. 10) making "confidential" all papers, records and documents upon the application of any person for admission. Originally added as subdivision 8 (L. 1945, ch. 675) and renumbered as subdivision 10 the next year (L. 1946, ch. 241 § 2, effective March 26, 1946), the statute still provides (Judiciary Law, § 90, subd. 10):

> "10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the

application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary."

Membership in the New York Bar is a Privilege, Not a Right

Membership in the New York bar has been deemed, by the New York courts, not to be an absolute right, but a privilege burdened with conditions. One of the conditions has been held to be the possession of good character. *Matter of Rouss*, 221 N. Y. 81 (1917). In the *Rouss* case, Judge (later Mr. Justice) CARDOZO stated (pp. 84-85):

"Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards (*Selling* v. *Radford*, 243 U. S. 46; *Matter of Durant*, 80 Conn. 140, 147). Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not

to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment (*Ex parte Wall*, 107 U. S. 265; *Matter of Randall*, 11 Allen, 473, 480; *Matter of Randel*, 158 N. Y. 216; *Boston Bar Assn.* v. *Casey*, 211 Mass. 187, 192; *Matter of Durant, supra*)."

It has also been deemed to be the New York law that the so-called "right" to practice law is "not a right, but merely a privilege, and may be withdrawn by the State through its proper disciplinary body when such privilege has been violated". *People* v. *Speiser*, 162 Misc. 9, 10 (N. Y. Co. Ct. Gen. Sessions, 1936). See also *Matter of Baum*, 55 Hun 611, reported in full, 8 N.Y.S. 771 (2d Dept., 1890); And see *Matter of N. Y. Co. Lawyers' Assn. (Roel)*, 4 Misc. 2d 728 (1956) aff'd 3 A. D. 2d 742 (1st Dept., 1957), aff'd 3 N. Y. 2d 224 (1957), app. dism. 355 U. S. 604 (1958), where it was emphasized that there was no inherent "right" to admission to the bar, but that New York has a right to prescribe the qualifications of those who practice law (4 Misc. 2d 728, 730-731).

Lack of Veracity Deemed by New York to be Evidence of Character

The significance attached to truthful replies in the statement or questionnaire submitted by an applicant to the Committee has been stressed by the New York courts. See *Matter of Baldwin*, 258 App. Div. 661 (2d Dept., 1940), where disbarment resulted from misrepresentations contained in the applicant's statement concerning, among other matters, the service of a clerkship then required of

all applicants pursuant to a rule of the New York Court of Appeals.

In *Matter of Klein*, 242 App. Div. 494 (1st Dept., 1934), admission to the New York bar, procured by fraudulent *misrepresentations* and *concealments* before the Character Committee, was also revoked. The Presiding Justice of the Court stated the (New York) law to be (p. 495):

> "It has been well held that fraud practiced by an applicant for admission to the bar, which affects even in the slightest degree his admission, strikes at the very foundation of his license to practice. To hold that a person may gain admission to the bar by *misrepresentation* or *suppression of the truth* and, if subsequently detected, may then use this fraudulently obtained certificate after a period of suspension, and thus be on a par with one who has rightfully come into the enjoyment of his professional privileges and obligations and thereafter stand upon an equal parity with the latter, would be to cast an aspersion upon every honest member of the profession" (Italics supplied).

The same Court, in *Matter of Schecht*, 242 App. Div. 495 (1st Dept., 1934) revoked a New York license to practice as an attorney where the evidence established that the attorney had, in a questionnaire signed and sworn to by him and filed with a Committee on Character and Fitness, given a *false answer* to a question as to whether he had "ever been a party to or otherwise involved in any action or proceeding either civil or criminal". He had made *no answer* to an item in the questionnaire in which the facts and name of the Court and the date of the action were to be supplied in the event that his answer concerning such litigation had been in the affirmative. The facts were that Schecht had been a party defendant (8 or 9 years prior to the date of the questionnaire) in an action brought by his first wife to annul their marriage on the ground that he

had made false and fraudulent representations at the time he induced her to marry him. Schecht sought to excuse his answer as "inadvertent". He also argued that "even if the question which had been erroneously answered by him had been answered properly, there would not have been the slightest reason" for disqualifying him from admission to the bar. The Court concluded from the record that Schecht had "deliberately concealed from the Committee on Character and Fitness the fact of such judgment" (242 App. Div. 495, 497).

In *Matter of Cassidy*, 268 App. Div. 282 (2d Dept., 1944), aff'd 296 N. Y. 926 (1945), where by reason of the 5-to-2 decision of the committee as to whether the applicant possessed the necessary character, the issue came before the Appellate Division for decision, the Second Department denied the application for admission, despite the favorable recommendation of a majority of the committee. The Court considered the fact that Cassidy advocated the creation of a private army as demonstrating his "unfitness" to become a member of the bar of the State of New York. It found that the record *also* demonstrated (268 App. Div. 286):

> "that the applicant lacks that high standard of veracity required by an officer of the court".

In *Matter of Greenblatt*, 253 App. Div. 391 (2d Dept., 1938), a reapplication for admission to the New York bar was denied, despite favorable action by a character committee, where the committee had disapproved the original application because of false answers in the applicant's original questionnaire. The applicant had in 1926 been dropped, for an "irregularity" in an examination, at The University of Maryland; and had sought to conceal such "dropping" and the reason therefor in the answers. The Court found the following facts (253 App. Div. 391, 392):

> "The applicant's difficulties originated in a false statement made by him in his first questionnaire, fol-

lowed by deliberate attempts, not only to deceive the committee, himself, as to certain irregularities while he was a student at the University of Maryland, but to enlist the aid of that university in such deception. It was for that reason that the application was originally denied in 1933. Upon this reapplication we find no evidence of repentance, but, to the contrary, the effort to deceive was continued, not only in the new papers filed, but in the oral examination before the committee and almost to the close of the hearing, when the truth was admitted."

In *Matter of Braunstone*, 265 App. Div. 337 (1st Dept., 1942), an attorney was disbarred in 1942, where the evidence established that in a questionnaire verified by him in September, 1932, and again in October, 1932, he denied that he had been a party to any action or proceeding other than those referred to in his questionnaire; when the actual fact, which he thereby concealed, was that in February, 1929, an action had been commenced against him by his wife in which she sought an annulment of their marriage upon the ground of fraud. The evidence before the Court sustained findings that the attorney had also made false allegations and given false testimony in support of an action which he brought in 1936 to annul a subsequent marriage. The Court also found that the attorney had "aggravated the seriousness of his misconduct by attempting to deceive the Referee by giving false testimony on the hearings" (265 App. Div., at p. 339).

The Rejection of Willner's 1937 and 1948 Applications for Admission to the New York Bar and Prior Denials of His Requests for Leave to File a New Application

I. Willner's Failure in 1937 to File a Truthful Questionnaire.

On February 13, 1937 and April 1, 1937, Willner filed with the Committee, in accordance with its usual requirement, his supposedly completed questionnaire (CrD 1, 3).* The filing of the *additional* April 1, 1937, questionnaire was required because Willner had *disregarded* the Committee's instruction that an applicant's answers *must be* in the applicant's own "handwriting".

In *prominent black type*, Willner was *warned*, on the *front page* of the *first* questionnaire he filed with the Committee, in these explicit terms:

> **"Applicant must answer all questions and inquiries for information, fully, truthfully and accurately. Any omissions or inaccuracies may be deemed ground for disapproval and rejection.**

---

* References preceded by the letters "CrD" are to items in the amended cross-designation dated October 5, 1962. By stipulation (on file) dated October 26, 1962, it has been agreed that the items set forth in the cross-designation be made part of the record on this appeal and that they need not be printed. The 1937 questionnaire and the other items cross-designated, together with the stipulation, have been filed with the Clerk of the Court.

We stipulated to relieve the appellant of the burden of printing all the papers specified in our cross-designation. We must respectfully refer, however, to the "complete file" which has been transmitted to this Court by the Appellate Division. It contains all the papers which were before the New York Court of Appeals. By reason of the passage of time since the appellant first made his application, some of the papers which, at various times, have been before the Appellate Division or its Committee, *may* have been destroyed or lost. But, we believe, all of the papers which were before the Court of Appeals, upon affirmance, are now in this Court's files.

"Ability to express full and responsive answers will be considered an element in the determination of fitness. The committee will not approve incomplete, defective, or carelessly prepared papers."

A similar *caveat* was printed in prominent type at the head of the April, 1937 questionnaire filed by applicant.

The usual procedure of the Committee is to place a notice in the New York Law Journal and to request information concerning the applicants for admission to the bar listed in such notices. In response to such a notice, a complaint, dated April 15, 1937, was received from an attorney, named Leo M. Wieder, stating in substance that he had employed the applicant from May 18, 1931 to November 7, 1931, as a law clerk and that because of absences, late hours and neglect of duties, he had asked the applicant to resign several days before his clerkship was to terminate because he "had not performed a regular law clerkship in accordance with the rules" (CrD 7).

The questionnaire filed by Willner with the Committee did *not* reveal in his answer to *Question 12*, asking him to state "law offices with which you have been connected, with address of each, nature of your connection and services, and the month and year of the beginning and ending thereof," the fact that Willner had *at any time* been *employed* by Wieder. His answer to Question 12 was "None".

In answer to Question 13, Willner, in response to a request for information as to the "law office or offices in which you served" a law clerkship, merely stated "No Clerkship" (CrD 1; 3).

II. Investigation by the Committee.

The Committee's clerk prepared a summary of Willner's questionnaire (CrD 2). That summary indicated, *inter*

alia (that: 1) Willner's statement of residence was questionable,* 2) that the questionnaire had not disclosed the fact that Willner had commenced a clerkship with Wieder as evidenced by a certificate dated May 11, 1931 purportedly filed by Willner with the Clerk of the New York Court of Appeals; and 3) that Willner had not disclosed in answer to the 16th question in the questionnaire, the litigation of the annulment of his first marriage, even though he had mentioned it in answer to question 8 (CrD 2).

It should be noted, before proceeding, that upon the face of the questionnaire, the service of a clerkship was not a *prerequisite* to Willner's admission to the Bar, since he had obtained a Master of Laws degree in 1934, in *addition* to a Bachelor of Laws degree in 1930. He had not passed his bar examination until June, *1936*.

A. Willner's First Meeting with the Committee.

According to the petition now before this Court, Willner had a "first meeting" with the Chairman of the Committee and two of its members at which he was "confronted with" the letter signed by Wieder (R 5). He told them the letter was "false" and "was instigated by the threat of extortion, the price of which was plainly labeled in the letter" (R 5). The Chairman allegedly promised a confrontation and an opportunity to prove the letter false (R 5-6).

B. The Hearing of May 4, 1937 (Tr. 1-22).**

On May 4, 1937, Willner appeared before the Committee. Five members of the Committee were present, including its

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* He had stated in his questionnaire that he lived with his parents in New York City. To the Committee Clerk, he stated he had a private home in Peekskill, N. Y., where he stayed with his wife and family (CrD 2). No question appears to have been raised at any later date as to the *bona fides* of his residence, since it did not appear he had voted in Peekskill (CrD 2).

** References preceded by "Tr." are to the transcript of the Committee's minutes (CrD 5).

Chairman. Confronted with the question as to whether he had ever been *employed in a law office*, he *admitted* he had been employed by a Leo M. Wieder (Tr. 1, 2). He *admitted* he "knew Mr. Wieder and I went up there and I got the job" (Tr. 2). He stated that "the moment I entered there to begin employment I filed a certificate of clerkship" (Tr. 3).

Willner's *explanation* for not setting forth his *employment* by Wieder was that he had worked with him "about a couple of days" (Tr. 2). He *denied* that he had had any difficulty with Wieder (Tr. 4).

Confronted with the fact (set forth in the Wieder letter of complaint) that Wieder said Willner had "worked" with him from May 18, 1931, until November 7, 1931, Willner *denied* Wieder was telling the truth (Tr. 4). He asserted, however, that, as a certified public accountant, he had for "over a year" maintained an "office in Mr. Wieder's office" (Tr. 5). Three days after he had made an arrangement for "desk space in an outer office, he had commenced working for Wieder and filed his certificate of clerkship (Tr. 6). He conceded that he had "made an arrangement with Mr. Wieder to do his clerking" (Tr. 6). Wieder explained that at the end of a week, he realized he couldn't be honest with him "doing my own work and his work" and the matter would lead to some trouble, so "I decided to let it go at that" and he told Wieder that (Tr. 6, 7). But he stayed in the office and paid rent to Wieder or to some other man (Tr. 5, 7).

Willner *denied* that Wieder had ever complained to him about absences or that Wieder had asked him for a resignation (Tr. 7, 8). He *denied*, too, asking Wieder for "an affidavit of clerkship from May 18th to November 17th, 1931 (Tr. 8). He avoided a clerkship by taking a course for Master of Laws from September, 1933 to June, 1934 (Tr. 8). He "did nothing" for three years after graduation from law school "about a clerkship or a Master's

degree" (Tr. 9). He again *denied* asking Wieder, in the summer of 1933, to give him an affidavit of clerkship from May 15th to November 17, 1931 and being refused by Wieder (Tr. 9). He *denied* becoming abusive and threatening and saying he would get even with Wieder (Tr. 9). This was "the first" he ever heard of this (Tr. 9).

He *admitted* knowing an Adolph Hunter. He was Hunter's accountant. He recommended Hunter to Wieder. But he *denied*, after leaving Wieder's employ, saying anything to Hunter with regard to Wieder. He denied ever telling Hunter that Wieder had been disbarred (Tr. 10). But he *explained* that Wieder had asked him that, upon cross-examination, in a suit for $700 he brought against Hunter, in which Wieder represented Hunter unsuccessfully (Tr. 10, 11).

Willner *denied* Wieder had ever stated to him "that he was calling this to the attention of the Committee"; or that he ever threatened Wieder "with physical harm, or any other way" (Tr. 11).

Questioned as to his annulled marriage to a sixteen year old, Willner denied knowledge of her age at the time of their marriage. He stated that he understood she was in her "third or fourth term high school but that she had been retarded in some way". He discovered her age after marriage, when he saw a picture her father had with the child's date of birth on it (Tr. 11). He did not defend the suit she brought, with her father as guardian. He never lived with her (Tr. 12).

Asked why he didn't "put that" annulment under the question dealing with *litigation* in which he had been a party, he explained (Tr. 12):

"Some people consider it a heinous offense."

He stated that the girl's parents had never sought to prosecute him. He was 22 and the ground of the annulment was non-age. He didn't have an attorney. Papers

were served on him, which he kept for years, but his illiterate mother "might have put them aside" (Tr. 12, 13). He named the attorneys who had represented his first wife. He subsequently married somebody else; and has two children (Tr. 13).

He stated he intended to practice law, if admitted, but intended to continue accounting, because he had contract obligations with people he did accounting for. Questioned as to whether he could practice law and accountancy at the same time, he said: "I can't do both" * * * "I think I will practice law"; and continued, to state, that he would give up his accountancy business "right away" (Tr. 13).

The hearing returned to the subject of Willner's "clerkship", under the questioning of another committee member (Tr. 14). He stated he had made the arrangement with Wieder three days before his clerkship began (Tr. 14). He made his arrangement with the other man in the office the same day. Although he had first mentioned this other man's name (Tr. 5) as "Brandt", Willner next stated he didn't "think his name was Brandt" (Tr. 14). His arrangement with "Brandt" was to pay rental for the use of the outside office. There were several people in the office—a lawyer, a real estate man and several others (Tr. 14-15).* His rent was $7.50 a month. He was to employ someone to carry on his work for his accounting clients, but there wasn't enough work to go around to pay a man. After a week, he told Wieder he was quitting (Tr. 15). It was "impossible to say honestly" he was clerking, and he "didn't want to do that" (Tr. 15). But he stayed there at least a year, doing only accounting on his own (Tr. 16). He thinks he paid the rent to a man named "Brandt" or a fellow named "Rosenberg" (Tr. 16). He could find out (Tr. 16). He has never had a "check account." He paid by cash (Tr. 16). He paid income tax only in the year 1933. He now owes The National City Bank $50 (Tr. 17).

* Cf. his present petition, R. 10.

Returning to his relations with Wieder, he explained that he denied on the stand, on cross-examination, the disparaging things Hunter had evidently told Wieder that Willner had said about Wieder. Willner told Wieder "to his face it was ridiculous, that I never said anything of the kind and he shouldn't harbor any such feelings at all. And that was the end of it" (Tr. 17). His relations with Wieder were "entirely pleasant" during that year. The question was brought up by Wieder in court, because Hunter didn't want to pay Willner the commissions Willner was entitled to (Tr. 17).

The commission was due Willner, he stated, for the sale of Hunter's business. Hunter and his partner, a Mr. Turnbull, had been recommended to Wieder by Willner as far back as 1929 or 1930 (Tr. 18). Hunter wanted to incense Wieder "in such a way that he would be angry at me and give the best in him to defend Hunter" (Tr. 19). But, even though he denied Hunter's story, Wieder "wasn't to be convinced". Wieder was angry and that was all there was to it" (Tr. 20).

He *admitted* (Tr. 20-21) he made a *mistake* when he answered "None" to Question 13 (sic) requesting him to

> "State all law offices with which you have been connected, with address of each, nature of your connection and services, and the month and year of the beginning and ending thereof. Include the law department of any corporation."

He sought to explain that he had "doubt at the time" and pointed to the next question as to "whether there was any claim made for any clerkship", where he also put down "None" (Tr. 21).

Asked whether he regarded the *mistake* as serious, he answered (Tr. 21):

> "A. Well, no. Probably, yes."

When the Committee pointed out that they had a letter of complaint from Wieder and the Committee didn't "know who Wieder is because you say you never worked for anybody", *Willner responded* (Tr. 21):

> "I realize now by virtue of the fact of this letter there is a serious thought there, but my own mind is absolutely clear and innocent."

To confirm his "innocence", Willner went on to assert that it was *he* who had sent out the certificate of clerkship; but he conceded that he had sent the certificate to the clerk in Albany (The Clerk of the Court of Appeals, where such certificates are required to be filed), but not to the Committee (Tr. 21).

Questioned by another Committee member he persisted in stating that, if admitted he would give up his accounting for the practice of law, after December 31, when his contracts expired with his accounting clients (Tr. 22).

The May 4, 1937 hearing closed with a statement by the Chairman of the Committee as follows (Tr. 22):

> "In view of the fact that there has been a complaint filed by Mr. Wieder the matter will stand adjourned. *You will have to explain more satisfactorily why you did not mention his name in answer to question 13* (sic). *We will give you every opportunity*" (Italics supplied).

C. Affidavit filed by Willner, verified December 1, 1937 (CrD 4).

The Committee permitted Willner to file a further affidavit, in December, 1937. In this affidavit, he purported to bring up to date the information requested of an applicant. With relation to question "12", he offered no further explanations for failing to reveal his 1931 connection with Wieder. As to question "13" he offered the explanation

that he was trying to determine whether he could complete the clerkship required for admission, but that the connection lasted only "about 4 days". He later submitted an affidavit, too, by an attorney, named Samuel Wolbarst, who stated he was associated with Wieder in 1931 and 1932. Wolbarst asserted in the affidavit that, to the best of his knowledge, Willner had desk room in the office (at West 34th Street, N.Y.C.) to do accounting and was not employed by Wieder as a law clerk and that any services or errands Willner performed for Wieder were purely voluntary. (Wolbarst's affidavit, verified April 26, 1938, is annexed in Court file to Willner's 1937 questionnaire.)

D. The Filing by James Dempsey of an Additional Complaint against Willner in December, 1937 (CrD 21)

While the Committee's investigation in connection with Willner's 1937 application was still pending, an additional complaint was filed against him. This complaint was received by letter dated December 1, 1937 from James Dempsey, an attorney with offices in White Plains. Dempsey's letter set forth his "grave doubt" as to Willner's fitness for admission. He offered to assist the Committee's investigators (CrD 21). Dempsey, upon interview in April, 1938, by a Committee investigator, stated that he had represented the Cortlandt Plumbing Supply Company (a company owned by one David Gross) which had sued and been sued by Willner, who had been employed to do some accounting work for the company. Among the allegations made in the litigation against Willner were that he had failed to return moneys that he had obtained for unsuccessful services in procuring an R.F.C. loan for his client; and that he had represented to his client that money was required "in order to take care of certain R.F.C. officials". Willner's counterclaim against the company was based on services rendered (CrD 23). The investigators' report (p. 1) disclosed that *Dempsey* had been attempting to work out a loan for Gross when *Willner* had "stepped into the picture".

E. Report of Character Committee Investigator, of December 1, 1937 (CrD 8).

An investigator for the Committee, through an interview with the "Daily Credit Bulletin", obtained information as to several lawsuits in which Willner had been, or appeared to be, a defendant, in the period from March, 1926, to November, 1937.

The Committee investigator also interviewed the White Plains attorney who had filed the December, 1937, complaint against Wieder. The investigator's report indicates that Dempsey confirmed orally the allegations contained in his letter of complaint. The *suit* against Willner alleged "false pretenses" by Willner in obtaining $300 plus a $65 check in fees from the Cortlandt Plumbing Supply Company, to obtain an R.F.C. loan. Despite the counterclaim by Willner for services and despite another claim by one, B. F. Curry (one of Willner's character references), on the $65 check, *Willner settled these suits by paying back $265 to the Plumbing Company.* The defense to the suit on the $65 check was that it was delivered to Willner with the understanding that it was not to be negotiated or presented for payment.

F. The Recommendation, dated May 16, 1938, that Willner be denied admission (CrD 14).

On May 16, 1938, a member of the Committee prepared a report for the Committee, recommending that Willner's application be denied (also annexed to CrD 71). The recommendation of denial was "because of his record and the misrepresentations of the applicant to the Committee".*

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* We are informed by the present Chairman of the Committee that references in reports of the Committee to an applicant's "record" have traditionally been made in the context of the "record" made by the applicant himself in the form of his questionnaires and the statements and explanations made by him upon any hearings held before the Committee.

As to Willner, the recommendation was preceded by the Committee member's preliminary observation (p. 1):

> "The record before the Committee discloses a number of matters requiring consideration."

The matters then discussed in the report related to: 1) Willner's failure to disclose in his questionnaire his employment by Wieder; 2) Willner's failure to list the suit against him for annulment in his answer to Question 17, even though he disclosed it in answer to Question 19; 3) his failure to list 6 judgments in addition to those mentioned by Willner in answer to Question 17; 4) Willner's failure to disclose the suit brought against him by Dempsey's client, Cortlandt Plumbing Supply Company, of which a Mr. Gross was president; and the Dempsey version of the facts of the suit, as obtained by a Committee investigator; 5) Willner's "general evasiveness" in answering questions, upon his first hearing before the Committee (see Tr. 1-22).

The report set forth Willner's "explanations" concerning the non-listing of his employment with Wieder; and his failure to list his annulment suit in his answer to Question 17.

On May 17, 1938, Willner was afforded an opportunity, at a further hearing, to offer his explanations as to the non-listed additional 6 judgments and as to the non-listing in his answers of his litigation with Dempsey's client.

G. The Committee Hearing Held May 17, 1938 (Tr. 23-34).

On May 17, 1938, Willner appeared again before the Committee. Four members of the Committee were present.

At the outset, he was questioned concerning a suit brought against him by a Mr. Herzog. Asked why he didn't mention it in his questionnaire he responded that the suit had been brought "only very recently", in November, 1937. He *admitted* that he had not mentioned the

suit in the supplemental affidavit he filed in December, 1937 (Tr. 23).

He also *admitted* that he had not mentioned a suit brought against him by the Bankers Indemnity Insurance Company in April, 1937. This suit like the Herzog suit, was settled in the very week it was brought (Tr. 23-24).

He *denied* that four other cases against Nathan Willners were cases against *him* (Tr. 24).

He was then questioned as to what his transactions had been with *Mr. Dempsey* (Tr. 24-34). His *explanation* was that, after he had sued a client in Peekskill for services, Dempsey had brought an action against *him* for *fraud* and *deceit;* that, after certain motions had been made, the actions had been settled on his paying Dempsey $200 (Tr. 24-25). He further explained, that it was an unjust claim, but that he had settled it "because he was coming before the Committee and for no other reason". In detail, he explained that the suit against him was for $365—consisting of $200 in checks, $100 in cash and $65 check", which Dempsey's client claimed he gave Willner; Willner *admitted* receiving the checks, but denied receipt of the cash; and stated that the sums ($200 in checks) received by him were paid for his services in securing credit for Dempsey's client through credit agencies and a bank; and the $65 was a "part payment on an R.F.C. loan I was negotiating at the time" (Tr. 25-28). He didn't get the R.F.C. loan for Dempsey's client, but renegotiated a $1,000 bank loan with the Westchester County National Bank (Tr. 28).

Willner *admitted* he "prepared all the papers for the R.F.C."; also that Dempsey's client claimed he gave Willner the $65 checks "to take care of" certain R.F.C. "officials", but Willner *denied* that he ever "gave anybody a nickel" of that money. He explained further that he had "written a brief" to the R.F.C. showing that this man was entitled to receive a $5,000 loan over a three-year

period; that R.F.C. agreed to take a financial statement from Dempsey's client for a subsequent period; that Dempsey's client had another accountant, who wanted to exaggerate the client's inventory, which Willner refused to do (Tr. 29-30).

Willner sued Dempsey's client first in the New York County Supreme Court for a balance due for services (approximately $300, he stated); his client then brought suit in Westchester County to recover the moneys that had been paid to him, alleging "false pretenses", a consolidation motion made by Dempsey was denied; then they got together and settled, by *his* payment of $265 (Tr. 30-31).

His explanation for not mentioning the litigation in his supplemental affidavit was that "he didn't owe anybody any money" and that was the only thing the Committee's secretary (Mr. Murphy) "impressed" on him. He "wasn't asked" to put them in his record affidavit (Tr. 31). He "wasn't told" he was to bring his papers up to date (Tr. 32). He maintained this position, allocating responsibility to Mr. Murphy, despite the fact that his affidavit of December 1, 1937 had referred to his February 28, questionnaire and then contained the statement (Tr. 32):

> "that since that time until the present date of the making of these premises, your deponent verily states that the answers to their interrogations set forth in the aforesaid required applicant's statement are still the same, except insofar as they affect the following questions numerically identified hereinafter."

All he did was to answer the questions Mr. Murphy had pointed out (Tr. 33). Mr. Willner's examination on May 17, 1938 concluded as follows (Tr. 33-34):

"By Mr. Ellison:

Q. As I understand it, Mr. Dempsey, in his action charged you with fraud? A. That's right.

Q. And you felt that you had received the money for work honestly done? A. That's right.

Q. You thought that by returning this money you would make a better impression before this Committee? A. I knew that Mr. Dempsey purposely brought that action and couched it in the terms he did because he knew at that time that I was coming up before the Character Committee.

Q. I didn't ask you that. I said, did you believe by settling that action charging you with fraud that you would come before this Committee in a better light? A. No.

Q. Than if you contested this issue of fraud? A. I did at that time, yes.

The Chairman: All right. We will excuse you."

H. Hearing of October 18, 1938 (Tr. 35-38).

A further hearing was held, with four Committee members present, on October 18, 1938.* At that hearing, Willner was accorded an opportunity to present to the Committee additional evidence and explanations. He adhered to his prior explanation for not listing the litigation with Dempsey's client—that he understood he was to list only his outstanding obligations (Tr. 36); and whether there was any litigation pending against (Tr. 37).

I. The Committee's Recommendation of October 18, 1938.

At the close of the October 18, 1938 hearing the Committee voted to concur in the recommendation of May, 1938—to deny Willner's application for admission. The five members of the Committee who had attended the hearings voted unanimously to reject the application. The *entire file of papers and the record* was then submitted to each of the other members of the Committee, who also

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* This hearing appears to have been held, at the request of Willner's wife.

unanimously concurred in the Committee's decision (CrD 13; letter to the Presiding Justice).

J. Hearing of October 26, 1938 (Tr. 39-43).

In response to a note dated October 19, 1938, from Willner's wife, she was permitted to appear before a member of the Committee on October 26, 1938. She was permitted to make a statement, which set forth in considerable detail, the family hardships which Willner had undergone and which still confronted him (Tr. 39-43). She was also permitted to state her own high regard for her husband (Tr. 40-41).

K. Formal Report of the Committee, dated October 31, 1938 (CrD 70).

On October 31, 1938, the Committee, in a report, signed by its full membership (10 members), stated that it had considered "the papers filed by the applicant and the statements orally made by him on his examination before it" and carefully investigated his character and fitness pursuant to Rule 1 of the Rules of Civil Practice. It stated further that "it has determined that it is not satisfied and cannot certify that the applicant possesses the character and general fitness requisite for an attorney and counsellor-at-law as provided in and by Section 88 of the Judiciary Law".

L. The Availability in New York of Judicial Review of the Denial of Willner's Application for Admission.

1. *By Appeal to The Court of Appeals.*

An application for admission to the Bar has been regarded in New York to be in the nature of a special proceeding.* When an application is denied by the Appellate

* In passing upon an application for admission to the Bar, the Courts in New York have been held to act "judicially". Cooper's Case, 22 N. Y. 67, 82-83 (1860). See also *In re Summers*, 325 U. S. 561, 565 (1945).

Division, it is subject to review by the Court of Appeals. That Court, in a proper case has exercised the power to reverse the Appellate Division, and to recommend an appropriate disposition of an application. See *Matter of Anonymous*, 10 N. Y. 2d 740 (1961).

2. *By Leave to Renew an Application, pursuant to Rule 1 of the Rules of Civil Practice.*

In addition, *specific* provision is made in Rule 1 of the Rules of Civil Practice for *renewal* of an application for admission. The rule, as revised in 1950, has required, however, the written consent of the Appellate Division to such renewals. Such consent is required to prevent abuse of the privilege of renewal. It is also designed to alert busy courts in populous areas, to prior court action and to facts relating to such prior action which might be buried in court archives or otherwise lost for various reasons due to the passage of time or the destruction of records.

M. Willner's Failure to Exhaust the Available New York Procedures to Review the 1938 Rejection of His Application.

It does not appear that Willner ever appealed, or sought to appeal directly from the 1938 denial of his application for admission. Nor does he appear to have exhausted his New York means of judicial review, in relation to several motions made by him, at various times subsequent to 1938, in various forms, for leave to renew his application and for other relief.

We shall refer to some details of these motions, made both before and after the Appellate Division, in 1948, allowed him to renew his application for admission. But before doing so, and before considering facts relating to his 1948 application, we shall refer to some post-1938 incidents, which were called to the attention of the Committee.

N. Complaints against Willner Received Subsequent to his 1938 Rejection.

1. After the Committee had filed its report, a letter was received from a Sylvester Barone, dated January 25, 1939, concerning Willner (CrD 15). It stated, in substance, that in 1938, Barone had given Willner $125 "to be used as a deposit in a business transaction" and that Willner had "converted this money to his use". This complaint was not investigated at the time it was received, since the Committee's report had already been filed. Subsequently, Barone was interviewed and stated that, in 1939, Willner gave him five post-dated checks for $5 each and that no part of the $100 balance had been paid. Barone offered to appear before the Committee (CrD 16).

2. On or about February 27, 1939, the Committee received from James Dempsey, Jr. a mimeographed letter sent by Willner to the editor of the Peekskill Evening Star, to the Exalted Ruler of the B.P.O.E. of Peekskill and to several other residents of Peekskill, the contents of which Mr. Dempsey referred to as "libelous" (CrD 24-26).

3. On or about March 23, 1939, the Committee received from Mr. Julian D. Cornell, a member at that time of the Junior Bar Committee of the Association of the Bar of the City of New York, which was sponsoring a reception to recently admitted members of the Bar, a letter addressed to him by Willner (CrD 27, 28). In it, Willner asked Mr. Cornell to explain to the "neophytes" being welcomed why Willner was not one of the successful candidates; and to point out to them:

> "The cowardly attribute that is manifestly concerned with a body of men who monopolize the very existence of a human being endowed with learning and ambitions, devoid of any personal aggrandizement that the Character Committee reaps."

He continued, to Mr. Cornell:

> "Do you know of any system of jurisprudence with but a taint of justice, where a judgment is rendered without any reason but merely steeped in stealth?"

In substance, he then asked Mr. Cornell to let him, the victim, know of the basis for the decision against him.

4. On or about April 7, 1939, the then Presiding Justice of the Appellate Division, Francis Martin, and the other Appellate Division Justices received a letter from Willner (CrD 29, 32). It stated:

> "For over *two years* my application before the Character Committee had been pending.
>
> There were some sittings before five men at which I attended from time to time, but on each occasion they took on a more peculiar aspect, steeped in some fine spun sophistries that were so obviously prejudicial, that the subtlety they intended, were limp from loss of vitality. * * *
>
> Then the ending off with *my inquiry* as to when the Committee would call me again, only to receive a letter in reply for the *very first time* that my application had been rejected.
>
> *No reason—no excuse—nothing.* Five men with a collected experience of about 150 years, jockeyed and bandied my name about for two full years before the clerk made up their minds for them."

5. On or about June 2 and June 12, 1939, Willner wrote letters to Fred L. Gross and Charles J. Buchner, both officials of the New York State Bar Association. (CrD 30-31). In these letters, Willner wrote, in part:

> "With whatever ounce of energy you can muster in your being, you must in the name of true administration of justice, add your voice against the cowardly method of unethical procedure in rejecting candidates to the Bar."

> May I state that I am prepared to testify before your committee at my own expense, anywhere in the State of New York, in reference to my case—similar no doubt to many others—whereby the Committee of Character and Fitness can be proved to be steeped in stealth; unethical in every sense of the word; political henchmen of a system of greediness which guarantees economic security to themselves alone; harboring the temerity to deprive rights without the necessity of stating reasons or conclusions of their particular findings; keeping the standards of attainments for admission castled in their own confines, in order to cloak their contemptuous determination in their exclusionary guillotine."

6. On or about December 12, 1939, the Committee received from Leo M. Wieder, the attorney who originally complained against Willner, a letter stating that on December 8, 1939, Willner had "severely assaulted" him. This alleged assault resulted in a criminal court proceeding, which will be referred to later (CrD 11).

O. Willner's 1943 Petition For Review or for a Rehearing (CrD 71)

On or about January 30, 1943, Willner filed with the Appellate Division a *petition* which he entitled "for review of his prior rejection for admission to the Bar and for a Further Hearing Relative to such Admission". It asked for a review or a new hearing (p. 11).

The petition (p. 1) noted that the testimony taken at hearings before the Committee and individual members thereof had been transcribed; was on file with the Clerk of the Appellate Division; and that

> petitioner deems it inadvisable to set forth at great detail the various phases of testimony and the basis upon which his application for admission to the Bar was denied."

The petitioner (p. 1) conceded that although he believed "*at the time*" that the Committee erred in its determination, "because of limited funds" he "could not proceed further to obtain a review of such determination"* (Italics supplied).

The petition requested a "further hearing" before the Committee so that it might properly consider "at this time" the question of Willner's "character and fitness to become a member of the Bar" (p. 2). It evinced an *awareness of the necessity and purpose of giving the Committee up-to-date information* for it stated expressly that he had listed his changes of address (p. 2):

> "So that the Committee can be properly apprised of the various places at which he has resided since the termination of the prior proceeding and the hearings in 1939."

The petition also recognized that his prior hearings had emphasized two distinct matters. He observed (p. 3)

> "*Firstly*, considerable stress was placed on the fact that in my questionnaire and statement for admission, I had set forth, in response to question 13, that I had served no clerkship."

He went on to explain his omission of this information and to dispute the credibility of the attorney who had filed the original complaint against him with relation to the clerkship (pp. 3-4).

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* Review of administrative determinations in New York must be sought within four months after the determination. N.Y.C.P.A. § 1296. Appeals to the New York Court of Appeals from Appellate Division orders generally must be taken within 60 days from the date of service of a written notice of the entry of an Appellate Division order. N.Y.C.P.A. § 592.

The *second* matter which he *acknowledged* had been stressed by the Committee was (p. 4):

> "my failure to state or explain more fully the nature of certain litigation in which I had participated at or about the time of my consideration before said Committee.
>
> Particular inquiry was made of me by the Clerk of the Character Committee during such time as to monies owing by me *and litigation pending.*" (Italics supplied)

He then sought to re-explain the circumstances of his litigation with his and Dempsey's client, Cortlandt Plumbing Supply Co. and the reason for *not disclosing* that litigation in his 1939 "additional statement" (pp. 4-5). He conceded (p. 5):

> "I do not deny that in my apparent desire to become admitted to the Bar, that I too erred in not submitting to the Character Committee full details as to that action, but it was at that time my sincere and honest belief that technically I was submitting what I had been requested to submit."

Note his reference to "full" details, when, as a matter of fact he had not disclosed the litigation at all.

The petition also contained an explanation of the circumstances leading to his being charged with *third degree assault* in 1939, by reason of his *breaking the nose of Leo M. Wieder*, the attorney who filed the original complaint against him (pp. 7-9). It also purported to bring up-to-date his various employments and professional activities as a certified public accountant (pp. 9-11).

P. The Committee Report dated February 8, 1943 relating to Willner's 1943 Petition (CrD 73).

The Committee prepared a report for the Appellate Division with relation to Willner's 1943 petition. This

report was "presented to the Court for such action as it may deem appropriate" (p. 3). Annexed to the report was a copy of the Committee's May 16, 1938 recommendation. Also annexed were copies (Exhs. B1 to B7) of certain letters written by Willner, after his rejection, which we have already mentioned (*supra*, pp. 29-31; reproduced herein as Appendix B1 to B7). The report (p. 2) stated that "The conduct of the petitioner since his rejection should also be considered". The report also emphasized (pp. 1-2) the fact that, in his December 1, 1937 affidavit, Willner had represented the continued correctness of his 1937 answers and that he had *then failed to mention* in his questionnaire the Cortlandt Plumbing Supply Company litigation referred to in Willner's petition.

Q. The Appellate Division, without opinion, on February 16, 1943, denied Willner's Petition.

R. July 24, 1947 Authorization by Willner to an attorney to examine the Committee and Appellate Division files (CrD 65).

On July 24, 1947, Willner authorized, in writing, an attorney named Morris Eisenstein to examine "any and all such papers and documents in the files of either the Committee on Character and Fitness, or of the Appellate Division, First Department and relate directly to my Admission to the Bar as an Attorney". This authorization, in the files of the Court, indicates that the testimony at Willner's hearings and the questionnaires filed by him were available to his attorney. Intra-Committee and Intra-Court reports were probably not made available, by reason of their confidential aspect.

S. Willner's 1948 Motion for a Rehearing Granted.

In January, 1948, Willner again moved for a rehearing. The Committee did *not* file a memorandum for the at-

tention of the Appellate Division. The Court, however, granted Willner's motion "insofar as to refer petitioner's application to the Committee on Character and Fitness for rehearing".

T. Willner's 1948 Questionnaire (CrD 6).

In connection with his renewed application for permission, Willner filed a new questionnaire, on May 21, 1948, together with supporting affidavits and other papers. This questionnaire is on file with this Court and will be referred to (*infra*, pp. 39, 40, 41) only insofar as it is necessary to clarify matters of significance at the 1948 hearings held by the Committee.

U. Additional Complaint against Willner received by the Committee prior to its 1948 Hearings.

On February 13, 1948, the following letter of complaint was received from Mr. Harold H. Rosenblum, an accountant:

> "It has been my displeasure to meet up with Mr. Willner on several occasions in the course of my practice. I herewith take this opportunity to state that Mr. Willner has demonstrated unprofessional conduct, unbecoming a member of a learned profession, by certifying to the correctness of a financial report he has prepared and submitted to an official Referee, the results of which were based not on facts, but on conjecture and the personal opinion of Mr. Willner.
>
> Furthermore, in October, 1947, while a witness before Official Referee, the Honorable John P. Cohalan, he testified under oath that he was a member in good standing of the New York State Society of Certified Public Accountants. He again repeated this testimony in November 1947 before the same referee. Subsequent investigation disclosed the fact that he was

not a member of said society for many years, and he still is not a member of the New York Society of C.P.A.'s now.

It is therefore my considered opinion that Mr. Willner is not a fit person to be admitted into your honorable body."

Upon receipt of the letter, the Committee's representative talked with Mr. Rosenblum on the telephone and was informed that in certain proceedings before Official Referee Cohalan the applicant had testified on behalf of the plaintiff in an action entitled John Alders and Curtis M. Marx v. Ora W. Grow; that among other things the applicant testified that he was at that time (July 1, 1947) a certified public accountant and was a member of the New York State Society of Certified Public Accountants. The following excerpts were taken by the Committee and subsequently referred to (in its report) from the stenographer's minutes of the applicant's testimony on July 1, 1947 before the Official Referee (CrD 74; Tr. 49):

"*Direct Examination*

By Mr. Windsor:

Q. Are you a certified public accountant? A. Yes, I am.

Q. And are you any—a member of any society of certified public accountants? A. Yes, I am.

Q. What society? A. New York State Society of Certified Public Accountants.

Q. For how long a time have you been a member of the Society? A. Well, I started in 1936 and due to the lapse of my illness I let things lapse. Then I was reinstated and I am a member in good standing today.

Q. I show you this paper, Mr. Willner, and ask you what it is? A. That is my certificate issued to

Accountants showing that I was a member since the sixth of March 1936 and I was reinstated as such.

Mr. Windsor: I offer that in evidence.

The Referee: You don't need it. I will take it without putting it in. Just make it as a statement unless they object to it on the cross-examination. You may want to keep that certificate. Show it to your adversary."

(*Note:* S.M., pp. 238-239. Then followed a colloquy about a slander suit brought by Wilbner against Hermelin for $25,000, reference to which will be made later on in this report.)

October 16, 1947.

"*Cross-Examination*

By Mr. Hermelin:

Q. You testified that you are a certified public accountant, Mr. Wilbner? A. Yes, sir.

Q. How long have you been such a certified public accountant? A. Since January 5, 1936.

Q. And you are a member of the State Association of Accountants? A. The New York State Society of Certified Public Accountants; I am a member.

Q. Are you a member in good standing? A. Yes, I am.

Q. Since when have you been a member in good standing of this Society of Public Accountants? A. I have their certificate since, I believe, 1936.

Q. Have you ever been dropped from membership for any time? A. I did not. I let my dues lapse. But in view of the fact that you raised the question I have got myself reinstated. I am a member in good standing.

Q. When were you reinstated as a member in good standing? A. Oh, a couple of months ago.

Mr. Carew: Your Honor, I think I will object to this line of questioning. I do not think he has to belong to that organization to be a certified public accountant.

Mr. Hermelin: It is a question of credibility.

The Referee: That he does not belong?

Mr. Hermelin. That's right.

The Referee: Would you say that any lawyer who did not belong to the Bar Association was not a qualified attorney?

Mr. Hermelin: If he testified that he did and he did not he would be guilty of perjury, wouldn't he:

The Referee: Take him to the District Attorney then.

Mr. Hermelin: We will prove that.

The Referee: You won't prove that before me. I am not trying anybody for perjury.

Mr. Hermelin: It is a question of credibility. That is the only purpose of my offering it before Your Honor.

The Referee: What was the motion made?

Mr. Carew: I will withdraw the objection, if that is what he wants it for."

(S.M., pp. 288-290.)

In connection with the applicant's statement that he was at the time of his appearance before Referee Cohalan a member of the New York State Society of Certified Public Accountants, a representative of the Committee interviewed Miss Mary C. Tully, the Office Manager of that Society, and received from her the following information: The applicant became a member of the Society on February 20, 1936; was dropped for non-payment of dues March 31, 1940; was reinstated May 13, 1940; dropped for non-payment of dues March 17, 1941; applied for reinstatement on June 20, 1947.

On June 11, 1948, the Committee's representative interviewed Mr. Wentworth F. Gantt, Executive Secretary of the New York State Society of Certified Public Accountants and was informed:

> "* * * that a complaint was filed by a member of the Society concerning his statement, under oath, in the Supreme Court Case of John Alders et al. v. Gros that he was a member of The New York State Society of Certified Public Accountants in good standing having been reinstated as such."

Mr. Gantt further stated that the applicant's application for "readmission to the Society is being held up for further investigation by our Committee on Admissions."

> (*Note:* In his questionnaire verified May 21, 1948, under Q. 20, which asks for the names, addresses, etc., of every group, association, society or organization of which he is or had been a member, the applicant makes the following statement: "N. Y. State Society of C.P.A.s—15 E. 41 St., N.Y.C.—12 years.")

In the slander suit hereinbefore referred to brought by the applicant against Marc Hermelin, the attorney who represented the defendant in the litigation before Referee Cohalan, the complaint was dismissed and judgment obtained against the applicant for $49.50 upon the dismissal of the action on the record on motion, and $40.46 upon affirmance of the order and judgment of the Supreme Court dismissing the complaint on motion.

On February 27, 1948, Mr. Rollins, who represented Mr. Hermelin in the slander action, stated to the Committee investigator that they had been trying to serve the applicant to collect the two judgments but had not been able to do so. Mr. Rollins also stated that the printer who printed the record on appeal had recently telephoned him

and stated that he had not been paid for printing the record on appeal.

(*Note:* In his questionnaire verified May 27, 1948, the applicant referred to these judgments and stated that they had been satisfied but did not say when they were satisfied.)

In a questionnaire issued to the applicant on February 20, 1948, and filed on May 21, 1948, the applicant reported seven cases of civil litigation in which he was involved, and that in one instance he charged Mr. Wieder with simple assault; in another he filed a cross-complaint for simple assault against a man named Silverstein; and a complaint against one Hymie Drath for attempted assault. He also reported that he had borrowed $1080.00 from the National City Bank on which there was still due $270.00 to be paid in three instalments.

V. The June 6, 1948 Hearing (Tr. 44-72).

At the opening of the hearing, Willner was offered an opportunity to make a statement. The Committee indicated it would be "glad to hear anything you have to say as to why the Committee should change its recommendation to the Court" (Tr. 45). He made a statement, which set forth, principally, as his reasons for wanting to be an attorney, the clarification of his reputation and the elimination, in his "own profession", that of a certified public accountant, of the risk of not being allowed to render an opinion that might be construed as a legal opinion (Tr. 45).

The Committee then proceeded to question him as to whether he had testified on July 1, 1947, that he was a member then of the New York Society of Certified Public Accountants (Tr. 46). There was read to him an extract of testimony he had given on direct examination in which he testified he was a member; having become a member

in 1936, letting membership lapse because of illness and then being "reinstated". On cross-examination in the action, he insisted he had been "reinstated" a "couple of months ago" (Tr. 50). Before the Committee, he admitted he had let his membership lapse in the Society in 1941 and had let the matter run that way, until his testimony as to membership was questioned before Referee Cohalan by a Mr. Hermelin. He then decided he was going to have himself "reinstated". He paid his check and appeared before a Mr. Wright (Tr. 51). He assumed that was all that was necessary (Tr. 46); but when he received no notice of any meeting, he wrote them and "the answer came back that my application had not been acted upon by the Committee—it was dormant" (Tr. 46). He went back to see Mr. Wright, his sponsor, who said he would "straighten it out", but that was the "last I heard" (Tr. 46). A girl secretary up there said in view of the fact that he had lapsed his "standing for non-payment of dues, they would have to wait a little while" (Tr. 46). But he had not been forewarned about it (Tr. 46).

He *admitted* that in his May, 1948 questionnaire, he had stated he was a "member" of the New York State Society of Public Accountants (Tr. 52). He justified that statement by the fact that they hadn't taken his certificate back (Tr. 46, 52). He paid only $25 dues; not the dues for the lapsed period (Tr. 52). He has since found out that he "could have been reinstated" by paying the dues for the period (1941 to 1947) when he wasn't paid-up and "wasn't a member" (Tr. 53). After several answers that appeared to be evasive, he stated that he came upon the knowledge as to payment of back dues only within the two weeks preceding his testimony before the Committee (Tr. 54).

He was asked to produce a letter of inquiry he allegedly wrote to the State Society (Tr. 54-55).

Confronted with the text of the letter he wrote in 1939 to Mr. Buchner, he answered (Tr. 56):

"Well, if you have my signature on it I suppose I wrote it."

He did not remember the name Buchner but admitted he "wrote to lots of people" (Tr. 56-57). In substance, he *admitted* that he wrote what had been read to him as the text of the letter to Buchner (Tr. 57). He had a "strong resentment" at that time. He *denied* that he *still* believed what he then wrote. He offered to make a "public retraction" (Tr. 57). His statement as to Committee methods was based on the Committee's failure to forewarn him of the Wieder complaint (Tr. 57). He *conceded* that Wieder's assault charge against him was withdrawn after Willner wrote a note in Court before Judge Cooper *promising* that "he would not annoy him (Wieder) further" (Tr. 59). He offered to supply the Committee with an affidavit by the attorney, named Santangelo, who represented him on the criminal charge, to show that Wieder had run out on ten occasions when the general calendar of the criminal court was being called (Tr. 59, 60). He later supplied an affidavit by Santangelo (CrD 58).

He *admitted* he had brought an action against a Mr. Hermelin *for slander* in 1946; and that the action had been dismissed (Tr. 60-61). He stated he had paid the costs on the motion and on his unsuccessful appeal to the Appellate Division, Second Department (See *Willner* v. *Hermelin*, 73 N.Y.S. 2d 412 [not officially reported], aff'd, 273 App. Div. 816 [1948]). He stated he paid the printing expenses on that appeal within a day of billing (Tr. 62); and offered to produce a receipt (Tr. 62).

He had *no* recollection of the complainant, Barone (Tr. 62-63).*

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* Cf. his 1961 statement, at R. 10.

He conceded he might have sent letters to the Peekskill Evening Star and to residents of Peekskill; to the Justices of the Appellate Division; and to Fred L. Gross (Tr. 64). By reason of Wieder's hearsay accusation and his treatment as a "nobody", he felt he had a right to "fight back" (Tr. 65).

As to his characterization of the Committee as "steeped in stealth", being "cowardly", "unethical" and "political henchmen of a system of greediness", he couldn't say "at that time" that he didn't feel "justified", but asserted "today, I am a little older and a little wiser" (Tr. 65). He was 36 *then* (Tr. 65). He felt hurt. His family was hurt. He couldn't think, talk or work right (Tr. 65-66). But, he composed the letters himself (Tr. 66). He felt that one of the Committee members had "abruptly" disposed of him (Tr. 66).

His last year's gross as an accountant was $11,000 (Tr. 67).

He admitted his characterization of the Character Committee's rejection as one where "the clerk made up their minds for them" (Tr. 68). All he asked was a "little forgiveness" (Tr. 69). One of the Committee members pointed out to Willner "it wasn't a question of personal feeling on the part of any member of this Committee. We don't have to forgive you for anything. We have a responsibility to report to the Court our findings, as to your character and fitness to be a member of the Bar on the basis of the facts before us" (Tr. 69-70).

W. The Interim Committee Report dated November 4, 1948 (CrD. 74).

This report, after referring to the order directing rehearing, dealt with two items, both of which concerned the giving of *false testimony* by Willner. First, the report referred to the fact that, at the June 16th, 1948 hearing, Willner's attention had been called to his testimony before

Judge Cohalan that he was a member of the New York State Society of Public Accountants (p. 1). The report contained an extract of the testimony that had been called to Willner's attention (pp. 1-2). In this extract, Willner had *testified*, that he had been a *member* and *had been reinstated*. The report continued (pp. 2-3):

> "Our investigation discloses that the applicant was dropped from the Society of Certified Public Accountants, and made application for readmission to the Society and that said application is still pending before the Committee on Admissions. The applicant's file at the Society's office discloses that Mr. Wright of Haskins & Sells, who interviewed Willner in connection with his application for readmission to the Society, recommended admission solely on the basis of statements made by the applicant that illness and temporary withdrawal from practice were the reasons for dropping membership in the Society. Mr. Wright stated that he had no knowledge of the claim of the alleged false testimony given by the applicant before Referee Cohalan, to the effect that he at that time was still a member of the Society in good standing."

The report also referred to an *ex parte* statement by Mr. Hermelin, the attorney in the proceedings pending before Referee Cohalan, to a Committee investigator. Mr. Hermelin had apparently stated (p. 3):

> "although he was reluctant to act as a stumbling block to one seeking admission to the Bar, it was his considered and determined intention to place before the District Attorney of New York County the testimony hereinbefore referred to, given by the applicant before Referee Cohalan. He further stated that he would have filed this complaint with the District Attorney except for the fact that the matter was still pending undetermined before the Referee."

The report concluded:

> "From the foregoing, it appears that there are two matters pending at the present time, involving the applicant: first, his application to be reinstated in the Society, which is still undecided; second, the filing of a complaint with the District Attorney of New York County (hereinbefore referred to), charging the applicant with perjury and which has not been filed to date because of the fact that the litigation in which the alleged false testimony was given is still pending and undetermined.
>
> In view of these pending matters affecting the applicant, I am of the opinion that the further consideration of this application be deferred until these pending matters are disposed of. At that time I recommend that the Committee take up for consideration the various communications which the applicant admits having written to judges and members of the Bar, concerning the action of the members of the Committee in denying his application for admission."

X. The November 20, 1948 Hearing (Tr. 73-76).

On November 20, 1948, the Committee resumed its rehearing.

Willner *admitted* he had not yet been readmitted to the New York State Society of Certified Public Accountants. He stated the Society's "Committee hasn't met" (Tr. 73). He *admitted* he *did not disclose* to Mr. Wright, who interviewed him for the Society, "anything in regard to the testimony" that he had given before Referee Cohalan (Tr. 73). He stated that Wright had marked his file "Passed for Admission" (Tr. 74). He stated that a December date had been set for the Society's Admission Committee meeting.

Y. Letter to the Committee, dated May 12, 1950, from its Secretary (CrD 75).

The Secretary of the Committee, on May 12, 1950, wrote the following letter, addressed to one of the Committee's members:

> "The application of Nathan Willner, which was denied by the Committee in November 1938, and on which the Court denied a rehearing in February 1943 but granted a rehearing in February 1948, will be on the June 5th calendar.
>
> The Committee examined the applicant on June 16, 1948, and again on November 10, 1948, and at the latter meeting you recommended that further consideration be deferred pending action by the Certified Public Accountants' Society on Mr. Willner's application for re-instatement therein, and also because Mr. Marc Hermelin, an attorney, had indicated that he would bring to the attention of the District Attorney of New York County the testimony of the applicant in litigation before Referee Cohalan.
>
> The Committee, acting upon your recommendation, deferred consideration to the next meeting. In January 1949 we received a letter from the State Society of Certified Public Accountants stating that Mr. Willner had told them he could not appear before their Admissions Committee in connection with his application for re-instatement, and that if they did not approve his application in absentia they should return his fee and vitiate his application. Their Committee voted not to approve the application without the interview and his application and fee were returned to him.
>
> Incidentally, when the applicant appeared before the Committee on June 16, 1948, he stated that when he decided to be reinstated in the early summer of 1947 he sent his check and that 'The check cleared.'

I talked yesterday on the telephone with Mr. Hermelin, who stated that the litigation has not been completed but that he is less inclined now to submit to the District Attorney's office the record of applicant's testimony wherein he stated under oath that he was, and had been for some years, a member of the State Society of Certified Public Accountants when, as a matter of fact, he had been dropped several years previously.

In view of the fact that Mr. Willner refused to appear before the Admissions Committee of the Accountants' Society and has withdrawn his application for reinstatement, and the further fact that it does not appear that Mr. Hermelin will press any charges against Mr. Willner, I thought you might wish to review the record and make a report at the June 5th meeting.

Therefore, I am sending the old application and related papers in one envelope, and the latest application with petition and related papers in a second envelope.

When you have finished with them, will you let me know and I will send for the papers."

Z. The Committee Report, dated May 31, 1950 Recommending Denial of Admission (CrD 76).

A report was prepared for the Committee by one of its members, dated May 31, 1950. After a review of the prior history of the application, the report turned to an examination of the complaint that Willner had testified falsely, in a civil action, as to his membership in the New York Society of Certified Public Accountants. The letter of complaint was set forth. So, too, was the extract of Willner's testimony which had been called to Willner's attention at the June 16, 1948 hearing. The result of the Committee's investigation was also set forth. The report noted, too, that Willner had, in his May 21, 1948 question-

naire stated that he had for *12 years* been a member of the Society (pp. 1-8).

The report continued, with a review of other details of the history of Willner's application, the hearings and the Committee's investigation (pp. 8-11). It concluded with a recommendation that the Committee adhere to its original decision denying the application. The Committee's reporter expressly stated (p. 11)

> "I am of the opinion that the applicant does not possess the necessary character and fitness for admission to the Bar."

AA. Report to Appellate Division by Committee, dated June 9, 1950, recommending rejection.

On June 9, 1950, the Committee reported to the Appellate Division its determination that Willner's application should be rejected. The report signed by the Committee's vice-chairman and eight other members, stated, in part:

> "The Committee has duly considered the additional papers filed by the applicant, the statements orally made by him on examination before the Committee, and carefully investigated his character and fitness pursuant to Rule I of the Rules of Civil Practice, and it has determined, on the record presented and upon the oral examination of the applicant, that it cannot, under the provisions of the Judiciary Law, certify him for admission to the Bar of this State, and, therefore, adheres to its original decision recommending denial of the application."

This report was transmitted to the Appellate Division by the Committee's Clerk, on June 19, 1950 (CrD 66).

BB. Willner's Attorney Schoenwald, in November, 1950 Copied the Minutes of the Committee Hearings and Sought Access to other Committee Records (CrD 68-69).

Maurice L. Schoenwald, an attorney representing Willner, in November, 1950, was allowed access to and copied "the lengthy minutes of the Committee" (CrD 69). He also requested the Court's permission to copy specified "letters, papers, documents, etc. as in your discretion and in accordance with the rules of the Court you can make available to the applicant or his counsel" (CrD 69). Notations on the attorney's letter indicate most of the items he specified were "available" (CrD 68).

CC. Willner's April 10, 1951 Application (CrD 78-79).

The Court records indicate that on April 10, 1951, Willner made a motion before the Appellate Division for an order (1) directing the Clerk to enter his name as an attorney and counsellor at law on the Roll of Attorneys and Counsellors; (2) directing the Committee on Character and Fitness to file a statement of the reasons upon which the Committee based its refusal to certify him; and (3) appointing a Referee to hear and report upon the evidence taken before, as to whether he possessed the character and fitness entitling him to be admitted.

The motion was denied by the Court without opinion. *No appeal* appears to have been taken from the Court's order, dated May 15, 1951, despite the detailed attack upon the Character Committee's refusal to certify Willner which was contained in the brief submitted to the Court by Willner's attorney, B. Leo Schwarz, predicated upon the failure of the Committee to make factual *findings* (CrD 78, pp. 1-7).

DD. Willner's June 7, 1951 letter to George N. Barrie, Jr. (CrD 80).

On or about June 7, 1951, a letter on the statjonery of Nathan Willner, accountant, appears to have been ad-

dressed to George N. Barrie, Jr. at Princeton, New Jersey; Barrie had been appointed a member of the National Foundation in which he was associated with a member of the Committee, Basil O'Connor. The letter to Barrie, which contains a vitriolic attack on Mr. O'Connor, has been filed with this Court. It is referred to by the Committee in a report subsequently made.

EE. The Motion Returnable November 27, 1951.

A motion for an order admitting him to practice was made by Willner, returnable November 27, 1951.

In connection therewith, a Committee report was filed, which referred to the Committee's prior reports on previous applications; and called attention to the letter referred to in the preceding paragraph (DD, *supra*).

The motion was denied.

FF. Willner's 1954 Petition to the Court for Leave, pursuant to Rule 1, to Renew his Application for Admission, *de novo*.

In March, 1954, petitioned the Court for leave, pursuant to Rule 1 of the New York Rules of Civil Practice, to renew his application for admission to the bar, *de novo*. His petition disclosed the following additional facts 2): he had resided alone at a new address since May, 1953, having procured a divorce *for cause*, against his wife; 6) as of May 15th, 1951, he had been reinstated as a member in good standing of the New York State Society of Certified Public Accountants and since December 11, 1951, had become a member of the American Institute of Accountants; 14) he recited, *verbatim*, a portion of the Committee's report dated 1950 refusing to certify him for admission to the Bar (thus indicating not only had the hearing testimony been made available, but also at least certain portions of the Committee's reports; 16) that after the denial of his April 10, 1951 motion by the Appellate Division which

in part sought to obtain findings from the Committee he had later moved again "by order to show cause, but the Justice (of the Appellate Division) to whom the order was submitted for signature refused to sign it"; 18) since he had last been before the Committee on November 10, 1948, he had continued to practice his profession of certified public accountant; 19) New York Education Law, Article 19 requires of an applicant for such a license that he be a person of "good moral character" and the same Article contains provision for a Committee on Grievances to which all charges and accusations against a certified public accountant of "fraud, deceit or gross negligence" are referred, and no charges have ever been made against him in connection with the public accountant profession; 20) he has been permitted to practice before the Tax Court of the United States for the past 17 years and was also admitted as an agent before the United States Treasury Department in 1928 and is presently so admitted; 21) he fully realizes that admission to the Bar is not a right but a privilege, deems the state to have made a promise to admit persons "of good moral character", yet he finds himself barred from admission "because of an adverse report, based apparently, * * * in the main on unsworn accusations"; 22) there is no announced standard of character and fitness so that in New York a person enters into the study of law wholly in the dark as to whether his past behavior will satisfy the Committee whereas in at least one other State a law student, before commencing study, must pass a character test; 22-a) he contrasted his situation, that of a person who had been engaged in the rough and tumble of "the battle of life," with that of the lily-white average student who came before the Committee without any incidents in his past life. He continued:

> "I fully realize that all which occurred before is now water over the dam. This application is not for a reconsideration of the previous rulings against me.

> Those rulings and adjudications I accept in all humility. This application is analagous to the application of a disbarred lawyer for reinstatement as a member of the bar."

25) then he called attention to the fact that disbarred attorneys have been permitted reinstatement in New York where they had led good clean lives since disbarment; 26) he persists in seeking admission to the Bar after so many unsuccessful attempts because such rejection is an adjudication of record that he lacks the requisites of character and fitness; such adjudication is a blot upon his good name, retarding his accounting practice and affecting his credibility as a witness particularly in the accounting proceedings where the books of fiduciaries have been audited; 27) he recognized that his application for admission on the basis of subsequent good behavior after rejection for "lack of good character" was unprecedented but regarded the lack of precedent not to be strange *because of the rarity of rejections;* 29) and he promised to comport himself with the dignity fitting a member of the Bar (Italics supplied).

GG. The Committee's Memorandum dated March 15, 1954 to the Court Concerning Willner's March 4, 1954 Motion (CrD 81).

After a chronological statement of prior efforts by Willner to be admitted, the Committee, by its then Chairman, in a memorandum to the Court, dated March 15, 1954, reported that:

> "The present application is based upon Mr. Willner's unsupported assertions that for five (5) years his conduct has been above criticism. The Committee has no information on the subject other than Mr. Willner's statements. He has submitted no supporting affidavits."

The recommendation of the Committee was:

> "In the opinion of the Committee Mr. Willner's record is not such as to entitle him to further consideration."

HH. Order dated April 27, 1954 (CrD 83).

On April 27, 1954, the Appellate Division denied Willner's motion for leave to file an application *de novo*, pursuant to Rule 1 (283 App. Div. 871).

II. Resettlement of the April 27, 1954 order (CrD 84).

On May 5, 1954, Willner, by his present attorney, moved for resettlement of the Court's order of April 27, 1954, since it appeared not to be a "final order", from which an appeal could be taken to the New York Court of Appeals. In support of the application to resettle, it was *then* urged:

> "An application for admission is a special proceeding, and denial of the application is an adjudication by the court that the applicant lacks good character. The adjudication is based on a finding of fact by the Committee on Character and Fitness that the applicant lacks good character. The evidence upon which such finding is based, consists in the main, of accusations by individuals, who are not required to be subjected to the test of cross examination. This creates a question of denial of due process which should be determined by the Court of Appeals."

The Appellate Division on May 18, 1954, granted the resettlement requested—to provide that "the application of the petitioner for admission to the Bar was denied" (CrD 84, 85).

JJ. The New York Court of Appeals denied Leave to Appeal from the Resettled Order (307 N. Y. 943, reargument denied 307 N. Y. 944), by orders dated October 21, 1954 and December 2, 1954, respectively.

KK. Willner's 1954 Petition to this Court for a Writ of Certiorari.

On December 29, 1954, Willner applied to this Court for a writ of *certiorari* for a review of the Appellate Division order, dated May 18, 1954 which, he stated, denied his "application for admission to the Bar of New York". His affidavit in support of his motion alleged, in part, that the Committee's findings had been predicated "on unsworn *ex parte* testimony" by two lawyers, with whom he had had business disputes, who were "not required to appear before The Committee, and who "did not confront me (the accused) so obviously I could not subject them to cross-examination", as a result of which he was denied admission, "without due process" (Affidavit of Willner, p. 3).

At the request of the Appellate Division, the New York Attorney General submitted a typewritten brief in opposition to the 1954 petition for *certiorari*. In part, the Attorney General's brief dated January 17, 1955, stated:

> "It is respectfully submitted that the petition should be denied because it is not shown to have substantive merit and particularly because of the lack of diligence which has marked its prosecution. The Petitioner is seeking to compel that which is not a matter of right. He is attempting a belated collateral attack on the 1938 determination. The decisions of the New York courts which are challenged are justifiable on grounds which involve no Federal question."

LL. This Court's denial of *certiorari* in 1955.

On March 1, 1955, this Court denied Willner's petition for a writ of *certiorari* (348 U. S. 955).

MM. Willner's 1960 Petition to the Appellate Division for Leave to file an application for admission *de novo* pursuant to Rule 1 of the New York Rules of Civil Practice.

In his 1960 motion to the Appellate Division for leave, Willner reviewed some of his prior efforts to become admitted and set forth what he deemed to be his then current qualifications. In his petition, he asserted in part:

"g) That, although the Committee on Character and Fitness has twice rejected my application, I now feel that I am much more mature and ripened in wisdom and understanding, and I know that I can establish myself as acceptable to the Committee, because I now understand the situation as well as myself better than ever before. At my early appearances before the Committee, I felt that I was being treated unfairly and unjustly, and *I reacted with great vigor*, which was induced by my anger and frustration. *I wrote letters, which were indiscreet and unwarranted, and unnecessarily strong in language. At subsequent interviews, my frustration and anger grew all the greater and my reactions became stronger.* I then displayed an attitude to the Committee which it could not reconcile with the character requisite for the admission of an attorney to the Bar of this State. I feel that this attitude was the main ground for my rejection; and although I feel that I succeeded in convincing the Committee that various items about which I was questioned were successfully and properly explained by me to show that I had not done any acts which should cause my rejection, *my attitude, having been one of open bitterness and resentment, must have led to my rejection nevertheless.* I know that I can now substantiate my good character and refute any implication to the contrary, if I be but given one more opportunity. I am frankly taking the position that my present character and fitness are important factors

in the consideration of this application. *I recognize, too, that my past life is to be considered in the final judgment.* In an evaluation of the history of human thought and practice, Alfred North Whitehead said, 'The proper test is not that of finality but of progress.' I ask the Court to apply this test to your petitioner. I most sincerely feel that at this date I can demonstrate to the Committee on Character and Fitness, and to this Court, that I should be favorably recommended." (Italics supplied)

NN. Denial by the Appellate Division of Willner's 1960 Petition for Leave (12 A. D. 2d 452).

On November 1, 1960, the Appellate Division, denied Willner's motion for leave, without opinion.

The Instant Proceeding

In May, 1961, Willner again moved for leave, pursuant to Rule 1. The papers with relation to that motion constitute the printed record which he has had prepared for this Court.

A. The 1961 Petition to the Appellate Division for Leave.

The 1960 petition stated that the Committee's determinations made in 1938 and 1950 had been made "without stating any sufficient reason, excuse or standard" (R. 3). He also stated that his effort to obtain a statement of reasons in 1951, by motion, had failed; and that motion had been denied, without *opinion* (R. 3-4). No reasons were given him, either, for the denial of his 1954 and 1960 petitions for leave. Nor did *this Court* give any "reason excuse or standard" for denying his prior application for a writ of *certiorari* (R. 4).

The *portion* of the petition setting forth the *facts* which he believed warranted the granting of leave brought up new charges of bias, and prejudice against members of the Committee and the Committee's Clerk (R. 5-10).

It raised a question as to the accuracy of the Committee's hearing transcript (R. 8). But, it also disclosed that *two years* previously he had been able to have a Bar Association representative obtain access to "my entire file". That representative allegedly told Willner there was "*nothing*" in the record or file or attending documents that could possibly impeach his character (R. 11).

The Appellate Division must be presumed to have had a different conception of the Committee's records, for it again denied his petition, without opinion. 13 A. D. 2d 956. And then denied him leave to appeal to the Court of Appeals (R. 16).

Willner then moved in the Court of Appeals for leave to appeal to that Court. The Court granted the motion, upon the basis of an affidavit by Willner, that the Character Committee in rejecting him had relied "wholly upon a personal impression" (R. 19) and that the record in this proceeding would show that the Committee had reported adversely to his admission mainly because of accusations contained in the letters of two attorneys, submitted *ex parte* by them and without affording Willner an opportunity to confront or cross-examine them (R. 20-21). *No mention was made in the application to the Court of Appeals of Willner's own failure to submit accurate, truthful and complete information to the Committee or of his own false testimony.* But upon his motion papers only, the Court of Appeals granted leave (R. 23).

The Court of Appeals did *not* request the Attorney General to participate in the argument of Willner's appeal to that Court. On March 6, 1962, it did, however, request the Appellate Division to "forward your complete file relative to the above case" (CrD 93). The file was sent and received by the Court of Appeals a few days later (CrD 94-96). Argument of the appeal in the Court of Appeals was presented only by appellant's counsel. Nevertheless, the Court of Appeals, with the Appellate Division file

before it, unanimously affirmed the Appellate Division order denying Willner's petition for leave (R. 25; 11 N. Y. 2d 866). The appellant having raised constitutional questions relating to due process, before the Court of Appeals, that Court amended its remittitur to indicate (R. 26-27):

> "Upon the appeal herein there was presented and necessarily upon a question under the Constitution of the United States, viz: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights."

Statement Concluded

"The foregoing lengthy summary of the record has been deemed necessary by reason of the inconvenient form in which a large portion of the record in this case is being presented to this Court. Enough has been shown, by our summary, we submit, to alert this Court to the fact that the actual record in this case does not present or require consideration of the constitutional issues asserted in the petition. The hair-raising allegations of the petition may have led this Court to assume jurisdiction. Careful analysis of the record will, we submit, lead this Court to the conclusion that neither the Committee nor the Appellate Division has been interested in *adjudicating* the collateral issues presented by various complaints which were filed against Willner.

The primary interest of the Committee, from the start, related to *Willner's own veracity,* in dealing with the questions listed and the information requested by the Committee's questionnaire. *Willner's own replies* furnished a *sufficient* basis for the Committee's judgments. It was clearly unnecessary for, and there is no clear showing that

the Committee did, in fact, decide issues against Willner, which were unsupported by his own admissions of untruthfulness.

The record indicates that, at times, Willner appeared to understand that the Committee's concern was in *his* truthfulness. What appears to have escaped Willner, at various other times, is the realization that it was *unnecessary* for the Committee, in concluding that his concealments were *intentional*, to ascertain that Willner had been *guilty* of the charges made against him. It was sufficient for the Committee to ascertain that he was *involved in a dispute* which he wanted to conceal.

After the concealments were discovered, Willner *admitted* the existence of the various disputes. It was not unreasonable or arbitrary for the Committee to infer that Willner, by reason of the *existence* of these disputes, had purposely not disclosed the facts which were omitted by him from his questionnaire. Sufficient *motive* for concealment by Willner was supplied by what might be deemed *his desire to avoid the risk* of having the Committee, upon a complete investigation, determine that *he* had been guilty of misconduct. In other words, the Committee needed to go no further than to determine that Willner had a reason to and was, in fact, seeking to thwart rather than to aid the Committee's investigation.

POINT I

Although appellant presented to the Court of Appeals questions as to federal due process and even though the Court of Appeals has amended its remittitur to certify that it had "necessarily" passed upon those questions, the fact remains that the order being reviewed by the Court of Appeals was merely a *discretionary* order. Even if this Court were to accept the Court of Appeals' certification, the fact also remains that the record before the Court of Appeals showed that the appellant had failed, at an appropriate time, to present his constitutional claims.

(1)

We recognize that, ordinarily, this Court will attribute great significance to a certificate by a State court that it has "necessarily" passed upon a federal constitutional question. See *Herb v. Pitcairn*, 324 U. S. 117, 127 (1945); Cf. *St. Nicholas Cathedral v. Kedroff*, 302 N. Y. 1 (1950), *remittitur amended*, 302 N. Y. 658 (1951), rev'd 344 U. S. 94, 97 (1952), where *both sides* have concluded that the judgment *could not* be sustained on state grounds. We must also recognize, however, that this Court has not regarded its jurisdiction to extend to cases where the disposition of the matter sought to be placed in review *may* have been predicated on a nonfederal ground. See the recent note, entitled "Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision". 62 Col. L. Rev. 822 (1962). See also *Stembridge v. Georgia*, 343 U. S. 541 (1952); *Black v. Cutter Labs.*, 351 U. S. 292 (1956); *Durley v. Mayo*, 351 U. S. 277 (1956).

(2)

The very wording of the appellant's petition, pursuant to Rule 1 of the New York Rules of Civil Practice, for "leave" to file an application for admission to the New

York Bar, clearly indicates the *discretionary* nature of the relief which was sought. Under the circumstances of the record, which undisputedly shows that the appellant's two prior applications, made in 1937 and 1948, had been denied and *not appealed*, it would seem that the only question which actually may have been left for determination by the Court of Appeals was whether the Appellate Division had "abused its discretion" in denying the appellant leave. We read the "no opinion" affirmance by the Court of Appeals of the Appellate Division denying leave to be the equivalent of a negative finding on that question.

(3)

It is also clearly possible that the Court of Appeals decision may have been predicated upon the ground that the appellant failed to assert *at a proper time* his ground of federal error—the asserted denial of due process, by reason of the Committee's alleged failure to permit him to "confront" and cross examine Wieder and Dempsey (Cf. R. 2-12, the allegations before the Appellate Division; with R. 18-23, the grounds asserted before the Court of Appeals).

(4)

For example, the Court of Appeals, with the complete file before it was in a position to question the timeliness of the present petition in the light of Willner's allegation therein (R. 5-6) that he had been promised "confrontation" as long ago as 1937 by the then Chairman of the Committee.

(5)

Or the Court of Appeals may have come to the determination that the very allegations of the petition, in the light of the complete record, showed that Willner had *deliberately* suppressed information which he could and should have supplied to the Appellate Division and the

Committee because it was available long ago. We refer especially to the allegation of the petition in which he asked the Appellate Division (R. 4):

> "to consider some of the background which is stated in this application for the first time."

(6)

Or as to his allegation that the Committee secretary had "intentionally" distorted the minutes of his hearing, the Court of Appeals, with the complete file before it, may well have questioned his *delay* in making this assertion when the file showed that he had authorized an attorney, as early as 1947, to examine the Committee's files (Cr. D. 64, 65); and as early as 1950, had requested permission to allow his then attorney to copy the Committee's minutes (Cr. D. 68, 69). His own attorney's letter indicates that the minutes were copied for Willner in 1950 (Cr. D. 69, p. 3).

(8)

Indeed, the Court of Appeals may have deemed Willner guilty of *laches*, in failing sooner to disclose "the hardly believable activities" of the Committee's secretary, narrated in the petition, with relation to the settlement of Willner's litigation with Dempsey's client (R. 8-9). Indeed, the Court of Appeals may have deemed Willner's willingness to submit to the secretary's alleged pressure, to be an indication of lack of the moral character and fitness required of an attorney.

(9)

Or the Court of Appeals may have decided that it was Willner's duty promptly to disclose that his "proof was sidetracked" by two named members of the Committee (R. 10).

(10)

Furthermore, with the transcript before it, the Court of Appeals may have determined that Willner had testified *falsely* when he had testified, contrary to the admitted fact, that he had been *reinstated* as a member of the New York Society of Certified Public Accountants, at a time prior to his actual reinstatement. Such a finding would be at odds with the allegation of the petition that "Many thousands of words were spent in discussing what was a mere technicality" (R. 10).

(11)

Finally, the Court of Appeals may have completely *rejected*, with the full record before it, the broad allegation of the petition (R. 11):

> "Though nothing has ever been cast on me that I could not prove to be false, malicious and conjurred up by the two members of the Committee, Mr. Basil O'Connor and Mr. Millard Ellison."

The Court of Appeals had ample ground, in 1962, for declining to afford petitioner an opportunity, at a new hearing, to prove that, a generation or so before, members of the Committee and its secretary had been guilty of misconduct, particularly when he had been making similar charges as to those gentlemen for more than 20 years (R. 11-12).

POINT II

Under New York law there is no absolute right to admission to the Bar. Good moral character is a prerequisite to admission. Neither the substantive requirement of good moral character nor the substantive requirement that the New York courts be satisfied as to the character of the members of the New York Bar has been changed by any of the recent decisions of this Court. Nor has this Court held that procedural due process requires that investigations into an applicant's character be undertaken only by means of a trial-type hearing.

(A)

We submit that we have already established (*supra*, pp. 3-6, 8-9), that the substantive law of New York requires that an applicant's good character and fitness be established before he is admitted to the New York Bar. The appellant has admitted, moreover, that an applicant in New York "is required to prove two issues, his knowledge of law and his good character" (Br., p. 5). His argument is based upon the assumption that Bar membership is not merely a privilege but a "right" (Br., p. 4). In view, however, of the appellant's concession (Br., p. 5) that he is required to prove his good character, we do not deem it any more necessary in this case than it was in *Schware* v. *Board of Exgminers of New Mexico*, 353 U. S. 232 (1957), to enter into a discussion of whether the practice of law is a "right" or "privilege". We believe it is sufficient, however (to paraphrase the Court's footnote to the *Schware* majority opinion, 353 U. S. 232, 239, footnote 5) to say that "a person can be prevented" from practicing "for valid reasons". Failure to establish good character, we submit, is such a reason.

(B)

The basic thrust of the appellant's brief (pp. 4-5) is that the Committee's refusal to certify Willner's character

was arbitrary. This conclusion is predicated upon the assumption (Br., p. 5) that Willner's character and fitness were determined by three members of the Committee whose decision was "questionably based on the *ex parte* charges made by the lawyers, Wiedner and Dempsey". The record which we have outlined above demonstrates that the basic assumption of the appellant's brief is false. The record clearly shows that the Committee's determination was predicated upon Willner's own questionnaires, affidavits and "the record" which he himself made upon his appearances before the Committee and by his admitted conduct elsewhere. Whenever the Committee received information *ex parte* or through its investigators, Willner was then given an opportunity to admit, deny or offer an explanation of the material involved.

(C)

A State's power to prescribe "high standards of qualification such as good moral character" was recognized by this Court in the *Schware* case (*supra*, 353 U. S. at p. 239). The only limitation set down even there as to a State's powers was that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law" (*idem.*, p. 239). Here, the Committee apprised the petitioner, at the very outset, in the form of the questionnaire he was required to fill out, that his fitness and character would be judged by the completeness, truthfulness and accuracy of his answers to the Committee's questions (*supra*, p. 3). Neither truth nor accuracy would appear to be an unreasonable gauge of character.

The applicant was warned that his "ability to express full and responsive answers" would "be considered an element in the determination of fitness". Again, a standard was clearly set forth by the Committee which may not fairly be described as unreasonable.

The *Schware* case held that due process had been violated because there was no reasonable basis in that record for

a finding that *Schware* had not shown good moral character. We need not review the relatively meagre evidence on which the New Mexico Board had rested its finding. It is sufficient, we submit, that this record shows that repeatedly Willner failed to make the truthful, complete and accurate answers to the Committee's questions, which the Committee required to be given with relation to such relevant subjects as employment and litigation. These failures were admitted by Willner himself, before the Committee. It was not essential, to disqualify him, that the Committee resort to allegations that had been made by other persons against Willner. Nor does it appear from the Committee's reports that the Committee deemed it necessary to do so.

Mr. Justice FRANKFURTER, in the *Schware* case, noted that qualities of "truth-speaking" must be exacted from members of the legal profession. He also related the long history of internal control by the profession of those who should enter it; and recognized that "moral character" has been "the historic unquestioned prerequisite of fitness" (353 U. S. 232, 248). Since we do not have before the Court any contention that New York in this case has employed legislation of a discriminatory character, we submit that we can appropriately call this Court's attention to the concession made in the *Schware* case by Mr. Justice FRANKFURTER as to the State's powers. First, he stated (p. 248):

> "Admission to practice in a State and before its courts necessarily belongs to that State."

Then he cautioned (p. 248):

> "It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar. No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which

> it may be said as it was of 'many honest and sensible judgments' in a different context that it expresses 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.' *Chicago, B. & Q. R. Co.* v. *Babcock*, 204 U. S. 585, 598. Especially in this realm it is not our business to substitute our judgment for the State's judgment—for it is the State in all the panoply of its powers that is under review when the action of its Supreme Court is under review."

In *Konigsberg* v. *State Bar*, 353 U. S. 252 (1956), relied on by the appellant (Br., p. 5), the Court stated that the questions asked of the applicant did not relate to "his honesty, trustworthiness, or other traits which are generally thought of as related to good character" (353 U. S., at p. 269). *Per contra*, here the questions asked related to his *truthfulness*. On his own admissions, the applicant had not been truthful, in many respects. In the first *Konigsberg* case, there was a "refusal to answer" from which the Court concluded "the State would not draw unfavorable inferences as to his truthfulness, candor or his moral character in general" (353 U. S. 252, 270). Here, the applicant did not *refuse* to answer. He supplied incomplete and inaccurate answers which, the Committee could reasonably find, were calculated to *withhold* information from the Committee as to matters in which it had indicated an interest—litigation and prior *employment* by a lawyer. Even a refusal to answer would have been more candid.

The significance of an applicant's responses in *thwarting a full investigation* into his qualifications was emphasized by this Court's decision in *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961). In that second *Konigsberg* case, it was held that the Fourteenth Amendment's protection against arbitrary State action did not forbid a State

from barring an applicant so long as he refused to answer questions "having a substantial relevance to his qualifications" (p. 44).

In the second *Konigsberg* case, this Court sustained the validity of a State requirement that an applicant for admission to the Bar bears the burden of proof of "good moral character" (366 U. S. 36, 40). As Mr. Justice HARLAN noted, Committee evidence may result from (*supra*, pp. 41-42):

> "the Committee's own independent investigation, from an applicant's responses to questions on his application form, or from Committee interrogation of the applicant himself. This interrogation may well be of decisive importance for, as all familiar with bar admission proceedings know, exclusion of unworthy candidates frequently depends upon the thoroughness of the Committee's questioning, revealing as it may infirmities in an otherwise satisfactory showing on his part."

In substance, the second *Konigsberg* case held that a State could refuse to admit an applicant who "refused" to fill the "gaps" in the evidence presented by him which the certifying agency considered should be filled (366 U. S. 36, 45). Willner's "gaps" were merely brought to our Committee's attention in a different fashion. Only after the Committee's attention was brought to the existence of the gaps, did he admit their existence.

If Willner had frankly, openly and completely set forth the history of his employment, his disputes, his litigation, the information so supplied like all the other information supplied to the Committee, would have been required to be kept confidential, within the limitations of New York Judiciary Law, § 90 (*supra*, pp. 7-8). A factor which disturbed Mr. Justice BLACK, in the second *Konigsberg* case (366 U. S. 36, 72), the omission of any requirement that

information given the Committee be treated "as confidential", is, therefore, not present here. In New York the information supplied to the Committee is so carefully guarded that except by way of an abstract of the prior court proceedings set forth in the brief opposing certiorari, the Committee's files were not made available to the New York Attorney General until after this Court had granted certiorari. It was only this Court's writ which opened to the public, as part of this Court's records, the information which has been hereinabove set forth—as to Willner's untruthfulness, lack of candor and evasiveness.

In re Anastaplo, 366 U. S. 82 (1961), interpreted (p. 88) the second *Konigsberg* case to be a holding that it was "not constitutionally impermissible for a State legislatively, or through court-made regulation as here and in *Konigsberg*, to adopt a rule that an applicant will not be admitted to the practice of the law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper function of interrogating and cross-examining him upon his qualifications." Further, he interpreted *Konigsberg* as holding that the State's interest in enforcing such a rule even outweighed any deterrent effect it might have upon freedom of speech and association (366 U. S., at p. 89). In this case, we do not even have present the First Amendment problems, which the majority "balanced" in the second *Konigsberg* and *Anastaplo* cases. Pertinently, however, we may cite, as to any evidence favorable to Willner, what Mr. Justice HARLAN said in *Anastaplo* (366 U. S., at p. 95):

> "there is nothing in the Federal Constitution which required the Committee to draw the curtain upon its investigation at that point. It had the right to supplement that evidence and to test the applicant's own credibility by interrogating him."

In *Anastaplo*, the Court also resorted to an examination of the Committee's report, before concluding that the Committee and the Illinois Supreme Court had regarded the petitioner's "refusal to cooperate in the Committee's examination of him as the basic and only reason for a denial of certification" (366 U. S., at pp. 95-96).

In *Anastaplo* the majority concluded (p. 96) with their statement of understanding that "Illinois' exclusionary requirement will not continue to operate to exclude Anastaplo from the bar any longer than he continues in his refusal to answer." Our case is somewhat different, since it does not involve a candid refusal. But it should be noted here that under Rule 1 of the New York Rules of Civil Practice, the door remains open to further applications by Willner, when and if he is able to persuade the Appellate Division to give its consent.

In *Cohen v. Hurley*, 366 U. S. 117 (1961), this Court again, as in the second *Konigsberg* case and in *Anastaplo* (*supra*, pp. 67-69), held that, even though a State could not *arbitrarily* refuse a person permission to practice law, it was not capricious to *disbar* an attorney who refused, on Fourteenth Amendment grounds, to *cooperate* in a court's effort to expose unethical conduct *even though it possessed no evidence of wrongdoing on his part*. So, too, as to Willner, it was unnecessary for the Committee to find that Willner was guilty of any of the charges made against him. It was sufficient that he obstructed the Committee's inquiries at the various times we have noted by *failing to furnish information required by the Committee*.

POINT III

Due process did not require that the Committee permit the applicant to confront and cross-examine persons who had furnished information to the Committee, since the Committee was not resolving the issues existing between the applicant and such persons. The Committee was interested in whether Willner had, in the information which he purported to supply the Committee, answered, as required by it, "fully, truthfully and accurately".

Appellant's argument as to cross-examination is broad, though short (Br., p. 6). Its brevity renders it as dangerous as most over-generalizations. We need not question the general desirability of affording *litigants* a trial-type hearing as to pertinent issues. But admission committees are not so constituted that they need pursue *every* collateral issue that be developed by an applicant's contradictory statements. Essentially, they are investigating committees in search of facts. Their facilities for conducting an *independent* investigation of its own, into an applicant's qualifications, are extremely limited, or, as Mr. Justice HARLAN observed in the second *Konigsberg* case, they "not infrequently" have "no means" to investigate (366 U. S. 36, 42). Basically, they must depend on information supplied by the applicant himself.

Just as the conception of "due process" in a disbarment case differs from that which must prevail in a criminal case, we urge that, *a fortiori*, the standards of the criminal law may not be held to control the investigation of an application for admission. As to an applicant, the Committee is not, as in the case of disbarment, stripping a person of any "vested right." *Ergo*, the applicant's position is weaker. We feel warranted, therefore, in adopting, as an answer to the appellant, what was said in *Cohen* v. *Hurley*

(*supra*, 366 U. S. at p. 127):

> "These bases for affording a procedure in such judicial inquiries different from that in criminal prosecutions are more than enough to make wholly untenable a contention that there has been a denial either of due process or equal protection."

Moreover, it has not been the practice of the Committees in New York to rely upon any *ex parte* statements. Where adverse facts appear the applicant's questionnaire, the Committees' investigation or other information, the applicant is given a hearing with respect to these adverse facts. We are told that no applicant is ever turned down on *ex parte* information. Any rejection is on the explanation and the testimony of the applicant himself regarding the adverse information.

Conclusion

It must be clear from the record of the hearings that the applicant was long ago made aware of the fact that it was his own non-disclosure of material facts that prevented the Committee from being satisfied as to his character. These matters did not relate to political beliefs. They did not relate to any claimed privileges against self-incrimination. They related primarily to the characteristics of veracity, candor and trustworthiness. The complaints against Willner were used to test these qualities, as the Committee reports show. Those reports show that the only other matters which received substantial attention related to letters which he admittedly wrote, which were obviously written in anger and showed *little regard for the reputations of other persons*. They, of course, as his own writings, were clearly entitled to be regarded with relation to his character. *In re Latimer*, 11 Ill. 2d 327, 143 N. E. 2d 20, cert. den. and app. dism. 355 U. S. 82 (1957).

Upon the record in this case, we submit that there is no showing that the Committee proceeded in disregard of due

process as that term has historically been used in connection with the investigation of the qualifications of a would-be attorney. *Cohen* v. *Hurley*, 366 U. S. (*supra*), at pages 129-130. On the contrary, Willner long ago, was fully apprised of the complaints filed against him and given a complete opportunity to negate or explain them.

The order of the Court of Appeals should, therefore, be affirmed.

Dated, New York, N. Y., January 25, 1963.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Appellee.

PAXTON BLAIR
Solicitor General

DANIEL M. COHEN
Assistant Attorney General

APPENDIX B-1

March 23, 1939.

Mr. Julien D. Cornell
1 Wall Street
New York City

Sir:

"In welcoming the Neophytes to the Legal Profession, will you please be kind enough to explain to these people why I was not one of the successful candidates?

"Would you point out to them the cowardly attribute that is manifestly concerned with a body of men who monopolize the very existence of a human being endowed with learning and ambitions, devoid of any personal aggrandizement that the Character Committee reaps?

Do you know of any system of jurisprudence with but any taint of justice, where a judgment is rendered without any reason, but merely steeped in stealth?*

When you have done that, could I, the victim, be made aware of the admeasurement of administration of justice whereby my adverse decision was reached?"

Respectfully submitted,

(Signed) NATHAN WILLNER
B.C.S.—LL.B.—LL.M.—C.P.A.
521 Fifth Avenue
New York City.

*Letter from Joe (the Clerk) Murphy dated February 27th, 1939.

APPENDIX B-2

(Copy)

February 15, 1939.

Editor of the Evening Star
Peekskill
New York

Sir:

My attention has just been directed to the Friday, February 10, 1939 issue of your worthy paper, by several serious minded citizens of Peekskill, for me to express my views to you concerning a report appearing on the very first page headed "Get Good Start—Dempsey Tells Boys."

To think and reflect upon that heading alone is a cause for so much amazement. Dempsey of all people! Standing before a group of Boy Scouts, mind-you, handing out some of his worst palaver, is at best an insult to those of Peekskill that rate themselves as having any intelligence at all.

Mr. Editor, you knew as well as all the others surrounding him, that the only reason Dempsey was there was for POLITICS solely. Is it not fair to comment upon the fact that there are real worthy *Scouts* in Peekskill who have devoted their valuable time, gave unstintingly of their meager funds, for an ideal American institution like Boy Scouts. What besides a few paltry side dollars has Dempsey ever contributed to American Ideals, to genuine leadership, to community welfare.

"Dempsey got a good start." That's the heading that should have come forth. Those poor kinds there weren't members of a palatine family; they won't be given fancy educational facilities—charge accounts for clothes—automotive transportation; then topping that all—a large inheritance, a lucrative law practice and a saddled political buggy, that drove him clear into White Plains as the office boy assistant District Attorney.

Appendix B-2.

What even chance can these children match with such a "good start." Who can tell which one among them would if given the privilege of some learning, rise to an immediate position for the State tho they had the learning of a Blackstone; the bleakness of the fathers existence would weigh heavily on their chance to rise. Yet he so callously quotes "The goal you reach depends on how you start." My dear Editor, you permitted that parastic paraphrase to besmirk your paper without the least comment of its begrimed irony.

Speaking on occasions of this kind has its marked effect. Not every one of your readers are from Peekskill and understand the circumstances too well. Outsiders who may be picked by Dempsey as a juror in his negligence practice, may signify that Dempsey was honored by this gathering (whereas in fact it was only then the machinations of a few political henchmen), with this result, that the juror may be inclined to believe everything that Dempsey from outside manifestations stood for.

His report of the crime situation as effects Boy Scouts was so shallow and obvious it was muddy. Of course it was a preconceived expression of one thing—*business:* Dempsey might have said a little less subtley but more poignantly "So in case you are ever held for one charge or another—Dempsey is the name, I know the ropes."

Dempsey goes on to state how fortunate the boys are that they are here in America, under American ideals. He should have stated further that their fathers are very fortunate to have Dempsey at the dinner and not in his office. It gave them a little mental relief from the fact that somebody may have an accident cause against them and that the aggrieved abated finding his way into Dempsey's office for at least that afternoon. His virtual monopoly of the accident business in Peekskill and the verdicts are appalling to any father present at the dinner.

Jim Dempsey's conscience apparently has readily overcome the *frame up* he perpetrated upon a father of two

children who were schooling here in Peekskill. This father was a four degree man, ambitious, good and honorable. While married he strove to greater potential heights, not at the cost of an insurance company or some unfortunate, but thru his own efforts, and that was to become a lawyer.

It was Dempsey whom this father first exposed, as having passed over to his own client, title defective to property that the client bought with Dempsey as the representing attorney.

It was Dempsey who asked this father to manipulate a financial statement to the bank, *where Dempsey was a Director*, which this father flatly refused to certify as a Certified Public Accountant.

It was Dempsey who sought to concoct "another method" of garnering a financial statement thru some maneuvers which this father exposed again and met with Dempsey's veiled Threat.

It was Dempsey who trumped up a lawsuit against this father, suing this father under a sham and pretext when Dempsey's case was obliged to go "out of the window."

It was Dempsey who then realized that the easiest method for a coward to pursue was to get influence to overcome this father.

It was Dempsey who manipulated to have the father called to the clerk's office of the Committee on Character and Fitness, where the clerk demanded Dempsey to be paid his pound of flesh.

It was Dempsey who turned about to the Character Committee on Admissions to the Bar after this father struggled through this weary depression to become an admitted lawyer and there committed mayhem on the father because:

It was Dempsey who had the political connections so securely locked in that he prevented this father's admission to the Bar now *two years*, and this father has not as yet received any foreboding as to the consequence.

Appendix B-2.

It was Dempsey who committed this father to a mental concentration camp for these two years, and reduced this father to penury and disgrace.

It was Dempsey who will continue to do these things so long as you make him principal speaker at any cost.

What a travesty for scoutdom to have a principal speaker talk about the relationship of father and son so callously when way back in the still, small annals of Dempsey's conscience is a story of a father whose ambition Dempsey maimed by dirty chicanery. A father of two children, who slaved through law school, did research in law, got 4 degrees in education, passed the Bar Exams and was to become a grand example of fatherhood to a son whose daily physical life was tortured by asthma, only to find an influential trickster like Dempsey had struck him a yellow blow before the Character Committee.

That fathers' case is still pending before the committee two years now—but Dempsey has not relented nor even shown signs of what any human father would do. Why? Because Dempsey fears the TRUTH and wants MONEY.

Why can't there be Real Scouts at a meeting so sacred to American ideals—not sacradotalism conferred upon a Mercenary hystricomorphic.

Respectfully,

Nathan Willner
B.C.S., LL.B., LL.M., C.P.A.
521 Fifth Avenue
New York City.

APPENDIX B-3

NATHAN WILLNER
Certified Public Accountant

April 7, 1939

521 Fifth Avenue
New York City

Hon. Francis Martin
Presiding Justice,
Appellate Division, First Department,
New York City.

Sir:

For over *two years* my application before the Character Committee had been pending.

There were some few sittings before five men at which I attended from time to time, but on each occasion they took on a more peculiar aspect, steeped in some fine spun sophistries that were so obviously prejudicial, that the subtlety they intended, were limp from loss of vitality.

It started with a private inquisition conducted in the office of Mr. Joseph Murphy, the clerk, at 51 Madison Avenue, concerning my activities with the Ku Klux Klan, though I was raised by Orthodox Jews on the lower east side of New York.

The situation at the first meeting of the Committee parried itself through a most peculiar charge based on the rankest hearsay, and a promise of a compensation in *six days* that never materialized.

Then the ending off with *my inquiry* as to when the Committee would call me again, only to receive a letter in reply for the *very first time* that my application had been rejected.

No reason—no excuse—nothing. Five men with a collected experience of about 150 years, jockeyed and bandied

my name about for two full years before the clerk made up their minds for them.

Manifestly incredible, but true! Especially after I am reliably informed that before any such final decision is made, whereby the sub-committee takes a man's career from him, he is given a living chance before the Committee as a whole.

That living chance is what I now plead for. There is nothing on my conscience that I am afraid or ashamed of. I did nothing wrong, other than to stand up as a certified public accountant and prevent a "Coster Case" from formulating over my signature at the behest of a political satellite of Westchester County. That is the essence of the refusal, nothing else.

Perhaps there are methods by which this issue could be brought to the forefront, but the injustice heaped upon me has left me penniless—bedraggled; my family was thrown into the street; my children were taken in by my mother-in-law; my wife has a furnished room, and I, wander aimlessly about trying to find the time when the crown of thorns will be lifted.

Respectfully yours,

(Signed) NATHAN WILLNER.

APPENDIX B-4

Murray Hill 2-6135

NATHAN WILLNER
Certified Public Accountant

521 Fifth Avenue
New York City
June 2nd, 1939

Mr. Fred L. Gross,
16 Court Street,
Brooklyn, N. Y.

Dear Sir:

The New York Times of May 28, 1939 announces the fact that His Excellence Governor Lehman has seen fit to call upon you for your worthy contribution of legal knowledge to the Survey Committee on Quasi Judicial Boards. It is most commendable.

May I be privileged to bring to your attention the fact that nothing can be of greater value to the true democratic principals of our government based upon the proper administration of justice than the COMPLETE ELIMINATION of that QUASI JUDICIAL body known as the CHARACTER COMMITTEE on admissions to the Bar.

In words of Justice Pecora in his book on "Wall Street Under Oath", there is nothing more definitely descriptive or apropos to this Character Committee than his words "The old regeme of unlimited license may be said to have definitely come to an end. The testimony had brought to light a shocking corruption in our . . . system, a wide-spread repudiation of old fashioned standards of honest and fair dealing, and a merciless exploitation of the yicious possibilities of . . . chicanery. The public had been deeply aroused by the spectacle of cynical disregard of fiduciary duty on the part of many of its most

respected leaders; . . . who conveniently subordinated their official obligations to an avid pursuit of personal gain . . ."

I might add too, in Justice Pecora's words, that it "is in the nature of individual benefit of their members." And later on he states something of "Legal Chicanery and Beneficent Darkness."

There isn't a thing in those words on the exposè of "Wall Street Under Oath" that doesn't befit the Character Committee, and I am ready, AT MY OWN EXPENSE AT ANY TIME CONVENIENT TO YOUR NEWLY FORMED GROUP, to give testimony of the experience that I had to be subjected to, and the suffering that was heaped upon me—not alone for myself, but upon my aged father and mother—my wife, who grayed and is ill today—my children, who were taken in after my family were thrown into the street for non-payment of rent—my sister and her family, who became janitors in order to hold their brood together.

Perhaps you may think this experience, after having four degrees append to my name, has left me vicious and perhaps free to make any unsupported statement. Then I take Judge Pecora's word, sentence by sentence, and show to you that even though that premise may be that befitting of cowards, mine is JUSTICE and properly so.

UNLIMITED LICENSE: The Character Committee today can make a candidate appear before them as many times as it pleases—at intervals as it wants, no matter how long a period of time elapses between these intervals—then conclude that they are "still investigating"! Investigating what? Well, they just don't have to give a reason.

A SHOCKING CORRUPTION OF OUR SYSTEM: — The members of the Committee are absolutely unqualified and unequivocally POLITICAL appointees. They are put there to exer-

cise their quasi judicial function because of the dictates of the presiding justice of the Appellate Division. Just imagine what opportunity there is to the same Justice that put these men in their castles.

Repudiation of Old Fashioned Standards of Honest and Fair Dealing: — The Character Committee has never in all these years, set up a governing standard by which candidates for admission to the Bar can be admeasured. They can refuse admission to a candidate his inaljenable right to practice on some disparaging theory, like the color of his necktie, if it so desired. No one is to say to the contrary, as to what constitutes a good admittant and a rejective one. The Committee reasons that out for itself Alone. Just imagine the many things that are abnoxious in this world today; that poison mens' minds, that instill prejudices and hatreds everywhere in one man's mind—then multiply that by the number of men on the Character Committee, and you have a rough idea of why the Character Committee can reject a candidate. Add to that religious intolerance—idealogies—isms, and a few other microbes which effect the brains of the underlings, secretaries and stooges through which this committee functions, and certainly the aspirations, ideals and cannon ethics look like lilies stuck in a dung heap.

Merciless Exploitation: — Need I say more than to indicate that the members of the Character Committee are working under an overhead and Personal Living Standard of $30,000. Per Year. Then they must be keyed to the proposition that their earning must go on! Competition from new forces into the fold are, of course, distasteful. Continual bickering for more and more requirements means that the profession will sink into the hands of those who cannot profess the Jacksonian philosophy of democracy in the law. It must resolve itself into the hands of the

moneyed classes—the very clients that the members of the committee cater to, or else, as soon as a candidate is admitted. He Must bend to temptation to make restitution for the enormous expense involved in becoming a lawyer. Cynical Disregard of Fiduciary Duty: — The committee, in rejecting a candidate for admission need not—And Do Not—give any reason for the rejection. In other words, they are at liberty to hold a candidate forth as undesirable in the eyes of legal society, as well as social, completely depriving him of everything for which he strived, by just a stroke of the pen in the very same manner as our Nazi Fuehrer—Editorial N. Y. Post—May 27th, 1939: "Appropriate property belonging to him? The looted households of the Jews in Germany, the ravaged monasteries and nunneries of Austria, the denuded bank of Czecho-Slovakia, all bear witness that is just routine Nazi doctrine". The same with the Character Committee. They too can cut a man's life off without any statement whatsoever. "Legal Chicanery—Beneficient Darkness", in the words of Justice Pecora.

Convenient Subordination of Official Obligation to An Avid Pursuit of Personal Gain: — The doctrine of "I Am Character" by the appointment on the committee, makes us all feel that conversely perhaps, we are Not of Character. Recently, I had occasion to speak to about 100 lawyers and none of them would dare try a case against any member of the committee, for fear that some day there may be retribution.

Every statement made for advancement of the legal profession is only within the realm of the Chairman of the Character Committee but at the same time the Chairman, or other members to their clients, become a guaranty of legal victory without opposition. Do they cater to the one who is poor or destitute—how can they? At the terrific financial burden that they must carry!

Just suppose for example, that at some time prior to admission to the Bar, a candidate had a case with their client—how do you think the candidate would fare under their ideas? They would force a settlement as they do now!

Suppose, also, that the candidate had expressed in writing or orally, some statement under the constitutional guaranty of free speech, or through an investigatory capacity, had exposed their client—or perhaps had gained a point of knowledge superior to the committee's! THESE MEN ARE IN ACTIVE PRACTICE today. They MUST satisfy themselves and clients who pay the FEES.

PRIVATE CLUBS: — That's the place to have "Legal Chicanery and Beneficent Darkness" NOT the Quasi Judicial monastery of righteousness.

May I beg of you to give this matter your thoughts for immediate discussion at the conference.

Respectfully

(Signed) NATHAN WILLNER
BCS—LLB—LLM—CPA

APPENDIX B-5

Murray Hill 2-6135

NATHAN WILLNER
Certified Public Accountant

521 Fifth Avenue
New York City

June 12, 1939

Mr. Fred L. Gross
16 Court St.,
Brooklyn, N. Y.

Re: *Committee of Unethical Practices*
Announcement in the New York Times

June 11, 1939.

Sir:

With whatever ounce of energy you can muster in your being, you must in the name of a true administration of justice add your voice against the cowardly method of unethical procedure in rejecting candidates to the Bar.

May I state that I am prepared to testify before your committee at my own expense, anywhere in the State of New York, in reference to my case—similar no doubt to many others—whereby the Committee of Character and Fitness can be proven to be steeped in stealth; unethical in every sense of the word; political henchmen of a system of greediness which guarantees economic security to themselves alone; harboring the temerity to deprive rights without the necessity of stating reasons or conclusions of their peculiar findings; keeping the standards of attainments for admission castled in their own confines, in order to cloak their contemptuous determinations in their exclusionary guillotine:

Appendix B-5.

Sir, may I also state:

1) There never will be anything like ethics, unless these omnipotent rulers are first insulated from their own private practices which they must safeguard continually.

2) There never will be ethics so long as the "recommendation" method exists, of ushering in candidates before these persons of almighty power and final say.

3) There never will be ethics so long as there is No STANDARD which governs the admeasurement of a candidate for admission to the Bar, for you leave open the door to one entrant and close it in the face of another of the same calibre or even better.

Can it be possible that the law has been so blind that it could not foresee the abuse to which the present method has been subjected to? Or has it been the machinations of a certain cool calculating crowd?

Respectfully

(Signed) Nathan Willner
B.C.S.—LL.B.—LL.M.—C.P.A.

APPENDIX B-6

(COPY)

Murray Hill 2-6135

NATHAN WILLNER
Certified Public Accountant

521 Fifth Avenue
New York City.

June 12, 1939.

Mr. Charles J. Buchner,
50 77th St.
Brooklyn, N. Y.

Re: *Committee of Unethical Practices*
Announcement in the New York Times

June 11, 1939.

Sir:-

"With whatever ounce of energy you can muster in your being, you must in the name of true administration of justice add your voice against the cowardly method of unethical procedure in rejecting candidates to the Bar.

May I state that I am prepared to testify before your committee at my own expense, anywhere in the State of New York, in reference to my case—similar no doubt, to many others—whereby the Committee of Character and Fitness can be proven to be steeped in stealth; unethical in every sense of the word political henchmen of a system of greediness which guarantees economic security to themselves alone; harboring the temerity to deprive rights without the necessity of stating reasons or conclusions of their particular findings; keeping the standards of attainments

Appendix B-6.

for admission castled in their own confines, in order to cloak their contemptuous determination in their exclusionary guillotine."

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2) There never will be ethics so long as the "recommendation" method exists, of ushering in candidates before these persons of almighty power and final say.

3) There never will be ethics so long as there is No STANDARD which governs the admeasurement of a candidate for admission to the Bar, for you leave open the door to one entrant and close it in the fact of another of the same calibre or even better.

Can it be possible that the Law has been so blind that it could not forsee the abuse to which the present method has been subjected to? Or has it been the machinations of a certain cool, calculating crowd?

Respectfully,

(Signed) NATHAN WILLNER
B.C.S.—LL.B.—LL.M.—C.P.A.

APPENDIX B-7

June 29, 1939.

Mr. John G. Jackson
15 Broad St.
New York City

Re: Editorial—World Telegram

Sir:

Enclosed is a copy of a letter I sent to every member on the Committee of Unethical Practices.

To date, I have received no acknowledgment, much less a reply.

Yet, no one, can deny the simple unadulterated truth for which this letter clamores.

May I beg of you to permit me leave to set forth a categorical sequence of events that occurred to me, and in *every step* you will perceive the rotten, indecent scheme that is prevalent today under the "Character Committee" method.

You may be assured that I am ready to appear before any body of men who are militantly seeking specific reforms in our present methods, for a finer administration of justice.

Your kind advice is anticipated.

Respectfully,

(Signed) NATHAN WILLNER
521—5th Ave.
New York City.

IN THE

Supreme Court of the United States

October Term, 1962

No. 140.

NATHAN WILLNER,

Appellant,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

HENRY WALDMAN,
Attorney for Appellant.

HENRY WALDMAN,
LESTER J. WALDMAN,
of Counsel.

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IN THE

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October Term, 1962

No. 140

NATHAN WILLNER,

Appellant,

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COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

Appellant's brief consists of six pages. Appellee's is a book of ninety pages. It presents an apt example of "methinks he doth protest too much".

Our petition for certiorari was based on two grounds—denial of confrontation by the two lawyers Wieder and Dempsey, which denied due process, in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution and on the ground, that the denial of admission was "arbitrary" in violation of the announced policy of the Court that a state may not arbitrarily deny one permission to practice law.

At the age of 36, Willner applied for admission to the Bar, more than a quarter of a century ago and he has been

fighting for it ever since. One may well wonder why one holding a bachelor's degree in Commercial Science, a license as a certified public accountant, a Master of Law degree, passed the Bar examination and had taught accounting and business law in three colleges, Iona in New Rochelle, N. Y., St. Francis in Brooklyn and New York University, lacks the character and fitness for admission to the Bar.

The majority of applicants for admission to the Bar are between 25 and 28 years of age. They had spent their college and law school years in school dormitories or at home, free of the necessity of entering the business world to engage in the rough and tumble of earning a living. Willner when he applied for admission was 36 years of age. He was married and had two children, one suffering from asthma, which induced him to locate his family in Peekskill, N. Y. He had the burden of supporting his family and contributing to the support of his elderly parents. So, he practiced public accounting in Peekskill, and in the very nature of things, had disputes and quarrels, occasional law suits, made enemies; in other words, the usual incidents of a business life.

The Appellee's Book

Pages 1 to 60 inclusive had one purpose—to create the impression that the denial of admission had some justification on the theory that every word was true.

The sixty pages should be disregarded as not a proper part of a brief.

Reply to Point I

All of Willner's applications for admission to the Character Committee beginning with the first in 1937 were completely ignored by it; no appearance of any kind, treated with a silent contempt and its actions, invariably affirmed by the Appellate Division and the Court of Appeals, unanimously and without opinion.

On page 61, learned counsel, realizing that the unanimous affirmations without opinion require explanation, indulge in a series of surmises or rather guesses or "may haves" commencing with subdivision (1), page 60 and terminating on subdivision 11, page 63.

The readings of the minds of seven judges, affords good mental exercise, and that is all.

Reply to Points II and III

We agree that good moral character is a proper prerequisite for admission to the Bar. But we urge that an issue which affects the life career of a person, should be tried like any issue of fact in a law suit, by appearance and confrontation of parties, and witnesses in accordance with common law rules of evidence and procedure.

Confrontation of witnesses is made mandatory only once in the Constitution—the 6th Amendment, which applies solely to trial of criminal cases. The protection of one in his life's career is entitled to as great consideration as that of the criminal.

The right to confront one's accusers has been fought for thousands of years. Plato relates that in ancient Greece, Socrates was condemned for subversion in such manner. At his trial he said:

> "And hardest of all, I do not know and cannot tell the names of my accusers. All who from envy and malice have persuaded you—some of them having first convinced themselves—all this class of men are difficult to deal with, for I cannot have them up here and *cross-examine them* and therefore I must simply fight and argue when there is no one to answer." (italics added)

The members of the Character Committee assigned to pass on Willner's fitness had tremendous power. Their "NO", rubber stamped by their seven colleagues, as a matter of course, was unanimously approved by the courts, and always without opinion and always without appearance by the Committee. No reason for the rejection stated—not even a three word sentence. Why the silence? Apparently on the theory that Bar membership is a privilege, which the state as Sovereign may grant or refuse at its whim or pleasure, an anachronism in the true sense of the word.

Conclusion

On the record before it, Willner was entitled to admission when he first applied, more than twenty-five years ago. He is entitled to admission now and without delay.

The order appealed from should be reversed, and the proceeding remitted to the Court of Appeals, with the direction that Willner be admitted to the Bar forthwith.

Respectfully submitted,

HENRY WALDMAN,
Attorney for Appellant.

HENRY WALDMAN,
LESTER J. WALDMAN,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1962

No. 140

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE COMMITTEE ON THE BILL OF RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

HERBERT MONTE LEVY,
ROBERT B. MCKAY,
ROBERT PITOFSKY,
HERBERT PRASHKER,
Attorneys for Amicus Curiae.

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Cases Cited

Other Authorities Cited

IN THE

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE COMMITTEE ON THE BILL OF RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Committee on the Bill of Rights files the annexed brief *amicus curiae* pursuant to consent of the parties hereto, submitted herewith.

Interest of *Amicus Curiae*

The Association of the Bar of the City of New York presently consists of more than 7,000 lawyers admitted to practice law in the State of New York and elsewhere. The Association was organized in 1871, and as stated in its Charter, its purposes include "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession * * *."

The Association's Committee on the Bill of Rights is charged by The Association's By-Laws with responsibility for consideration and report on all matters relating to rights guaranteed by the Bill of Rights. When authorized by The Association's Executive Committee, it may participate as *amicus curiae* in pending litigation involving alleged deprivation of rights guaranteed by the Bill of Rights.

The Association of the Bar of the City of New York has for many years conducted grievance proceedings in the First Judicial Department of the State of New York, and brings to the attention of the Appellate Division of that Department violations by lawyers of statutes relating to positions of legal trust and other breaches of the Canons of Legal Ethics. Such charges are prosecuted by court-appointed attorneys, usually on the staff of The Association's Grievance Committee, and heard by a special court-appointed referee who reports to the court. The Committee on the Bill of Rights believes that an applicant for admission to the bar has an interest in a full and fair hearing at every stage of admission proceedings, no less than an attorney already admitted to practice has in disciplinary proceedings.

This case appears to be of the first importance for lawyers and their profession because it presents a fundamental challenge to the procedures by which admissions to the bar have been determined in the State of New York, one of the principal areas of lawyer concentration in the nation.

The members of both the Committee on the Bill of Rights of The Association of the Bar of the City of New York and its Executive Committee, which authorized the filing of this brief, are unanimous in their belief that an applicant for admission to the bar is entitled, as a matter of due process, to notice of charges against him, confrontation and opportunity for cross-examination of adverse

witnesses, and judicial determination of his admissibility on the basis of a record to which he is not denied access. Both Committees, however, are divided as to whether the record in this case presents all of the questions here discussed in wholly satisfactory form for decision on the merits, and are divided as to whether this is a proper case for intervention by the Committee on the Bill of Rights. A majority of both Committees, however, believe that on questions of such fundamental importance, The Association of the Bar of the City of New York should not be silent, particularly where, as here, certiorari has been granted, presumably with some or all of the questions here discussed in mind, and where a motion to dismiss the writ as improvidently granted has been denied. Accordingly, this brief is filed to state the views of the Committee on the Bill of Rights on these questions. Neither of the Committees, nor The Association, takes any position as to the qualifications of Petitioner for ultimate admission to the bar. This is of course a matter for determination by the Committee on Character and Fitness and by the courts of New York after such further proceedings as may be ordered by this Court.

This brief is addressed to the following principles:

1. That an applicant for admission to the bar is denied due process of law under the Fourteenth Amendment to the Constitution of the United States when a Committee on Character and Fitness, with authority to certify the applicant's qualifications for admission to the admitting Court (a) fails to give notice of the charges against him in advance of the hearings before that Committee, or (b) considers derogatory statements made to it as evidencing the applicant's lack of the necessary qualifications for admission, without confronting the applicant with those persons, and without subjecting their statements to his cross-examination.

2. That a state Court denies an applicant due process of law when it rules on the merits of a claim that earlier denials of his application for admission to the bar were themselves infected by denial of due process, on the basis of a record the applicant does not know is before that Court, and which is not made available to the applicant until after certiorari is granted by the Supreme Court of the United States.

Statement

A. Applicable Statutes and Rules

Section 90(1)(a) of the Judiciary Law of the State of New York vests in the Appellate Division of the State Supreme Court of each of the four Judicial Departments of the State the power to admit applicants to the bar. Under that Section, the Appellate Division may not admit an applicant to practice without certification by the State Board of Bar Examiners that he has either passed the bar examination or that the bar examination has been dispensed with. Thereafter, the Appellate Division to which an applicant has been certified by the Board of Bar Examiners,

> "if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys." [Judiciary Law § 90(1)(a).]

Rule 1 of the New York Rules of Civil Practice provides in part:

> "(a) The appellate division in each judicial department shall appoint a committee of not less

than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

* * *

"(d) Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth in his usual handwriting all the information and data required by the committee and the appellate division justices, including specifically his present and past places of actual residence (listing the street and number, if any) and the period of time he resided at each place.

"(e) In the event that any applicant has made a prior application for admission to practice in this state or in any other jurisdiction, then, upon said statement or questionnaire or in an accompanying signed statement, he shall set forth in detail all the facts with respect to such prior application and its disposition. If such prior application had been filed in any appellate division of this state and if the applicant failed to obtain a certificate of good character and fitness from the appropriate character committee or if for any reason such prior application was disapproved or rejected either by said committee or said appellate division, he shall obtain and

submit the written consent of said appellate division to the renewal of his application in that appellate division or in any other appellate division."

Section 53(1) of the Judiciary Law authorizes the Court of Appeals to

> "adopt, amend, or rescind rules not inconsistent with the constitution or statutes of the state, regulating the admission of attorneys and counsellors at law, to practice in all the courts of record of the state."

Pursuant to that authority, the Court of Appeals has promulgated separate Rules for the Admission of Attorneys and Counsellors-at-Law which provide in part as follows:

> "*VIII-1. General Regulation.* Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counsellor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.
>
> "*VIII-2. Supporting Affidavits.* Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.
>
> "*VIII-3. Certificate of Board of Law Examiners.* Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

> "*VIII-4. Discretion of Appellate Division.* The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

The Appellate Division of the First Department has not published "additional rules" under Rule VIII-4. The Character and Fitness Committee of the First Judicial Department, designated in accordance with these rules, consists of ten members. No rules or statements of procedure have been published by the Committee.

Section 90(10) of the Judiciary Law provides, in part, with respect to the records of proceedings in bar admission proceedings:

> "* * * all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law * * * shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. * * * In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary."

Rule 1(g) of the Rules of Civil Practice provides:

> "(g) Every application for admission to practice, together with all the papers submitted thereon, upon its final disposition by the appellate division shall be filed in the office of the clerk of such appellate division."

B. Willner's Petition to the Appellate Division

The proceeding now before this Court began with a verified Petition, dated May 22, 1961, filed by Willner with the Appellate Division, First Department, pursuant to Rule

1(e) of the Rules of Civil Practice, designated a "Petition for Leave to File Application For Admission to the Bar." The Petition, filed *pro se*, alleged, in substance, that:

Willner had been certified by the State Board of Law Examiners as having passed the bar examinations in 1936 (R. 2-3); that the Committee on Character and Fitness ("the Committee") had, in 1938, after "several hearings," filed with the Appellate Division, its determination

> "that it is not satisfied and cannot certify that the applicant possesses the character and general fitness requisite for an attorney and counselor at law, as provided by Section 88 [now 90] of the Judiciary Law";

that, in 1943, Willner applied to the Appellate Division for an order directing the Committee to review its 1938 determination, this motion being denied without opinion; that Willner, in 1948, again petitioned the Appellate Division for re-examination of his application by the Committee, or to permit a new application to be filed, and that the Appellate Division then directed that he be permitted to file a new application; that upon the filing of Willner's new application, the Committee conducted two hearings in 1948, and, "by its Report of June 9, 1950," for the second time, the Petition alleges, refused to certify him, "without stating any sufficient reason, excuse or standard" (R. 3); that in April 1951, Willner again made application to the Appellate Division, this time for an order directing (a) that he be enrolled as an attorney, (b) that the Committee be directed to furnish him with a statement of its reasons for its refusal to certify him, or (c) that a Referee be appointed to hear and report on the question of his character and fitness, and that this application was denied without opinion (R. 3-4); that in May 1954, he filed a fourth application with the Appellate Division, requesting leave to file an application for admission *de novo*, which application was denied without opinion, the Court of Appeals refusing leave to appeal and this Court refusing a

writ of certiorari (R. 4); that in 1960, Willner filed his fifth application with the Appellate Division (for leave to file an application for admission *de novo*), which application was denied without opinion on November 2, 1960 (R. 4).

The Petition further alleged that Willner has been a member in good standing of the New York Society of Certified Public Accountants and the American Institute of Accountants since 1951; and that he has been admitted to practice before the Tax Court and the Treasury Department since 1928 (R. 4-5).

The Petition then alleged "the basic facts" concerning "the background of my various hearings" before the Committee on Character and Fitness (R. 5). It alleged that, in connection with Willner's hearings before the Committee on his 1937 application, he was confronted with a letter, containing certain false statements about Willner, from a New York attorney, Leo M. Wieder; that a member of the Committee promised Willner a personal confrontation with Wieder, but that later on, he "could only infer" that the Committee refused a confrontation of Mr. Wieder (R. 5-7); and that the Committee "apparently sustained" Wieder's charges (R. 10). The Petition also contained allegations that Willner had been involved in litigation with a lawyer from Peekskill, New York, James Dempsey, who had it as his purpose "to destroy me" (R. 8), that the Committee Secretary was "taking orders" from Dempsey (R. 9), and that two members of the Committee were "in cahoots" with Dempsey (R. 9).

The Petition concluded with a prayer that Willner be given the opportunity (a) to appear again before the Committee, (b) to appear before a Referee empowered to hear and report on the facts, or (c) be admitted to the bar forthwith (R. 12).

C. Proceedings in the Appellate Division

Following the service and filing of the above Petition, the Committee, named as the Respondent, served no papers on Willner in opposition to the Petition, and did not "appear" in opposition to the Petition. However, the Appellate Division had, as part of its own records under Rule 1(g) of the Rules of Civil Practice, the original papers constituting the file on Willner, including Willner's two original questionnaires filed with the Committee, investigators' reports on those applications, letters from lawyers and others complaining of Willner, affidavits attesting to good character, internal Committee correspondence concerning Willner's applications for admission, the earlier applications to the Appellate Division, internal correspondence of the Committee relative to those applications, the minutes of Willner's various hearings before the Committee, and reports to the full Committee by Committee members assigned to furnish such reports.[1] This file of papers, some two inches thick, was, as we shall see, also before the Court of Appeals, and now reposes in the Office of the Clerk of this Court (see *infra*, pp. 14-15).

The Appellate Division, with Willner's Petition and this file as part of its own records, denied the Petition without opinion (R. 13). The recitals in the order of the Appellate Division listed Willner's Petition, but not the other papers constituting its own file as being before it in its consideration of the Petition:

> "Now, upon reading and filing the notice of motion, with proof of due service thereof, and the petition of Nathan Willner, duly verified the 22nd day of May, 1961, in support of said motion, and after hearing Mr. Nathan Willner, pro se, for the motion, and no one appearing in opposition thereto,

[1] Portions of the papers constituting this file, including the minutes of previous hearings before the Committee, had been made available by the Clerk of the Appellate Division to an attorney of Willner in connection with earlier proceedings in 1950 (Cr. D. 68-69).

"It is ordered that the said motion be and the same hereby is denied."

D. Proceedings Before the Court of Appeals

Willner sought leave to appeal from the Appellate Division's order to the Court of Appeals (R. 17). He furnished an affidavit in support of his motion for leave which asserted that:

> "An examination of the record in this proceeding will disclose that the Committee reported adversely to my admission mainly, and perhaps solely, because of accusations made by two lawyers, Leo M. Wieder who was discredited and James Dempsey who was brought up on charges of jury tampering. To the best of my knowledge, they were made in writing, whether by simple letters or by formal affidavits, I do not know. On either way, they were ex parte statements, which had common law rules of procedure and evidence followed [sic], would have been clearly inadmissible." (R. 20).
>
> "* * * I was never afforded the opportunity of confronting my accusers, of having the accusers sworn and cross-examining them, and the opportunity of refuting the accusations and accusers." (R. 20-1).

The Committee filed no papers in opposition to the motion for leave to appeal. The Court of Appeals granted leave to appeal, Willner having limited his grounds of appeal to the claimed denial of confrontation and cross-examination (R. 22-3). In the Court of Appeals, Willner filed his Petition in the Appellate Division, the Appellate Division's order, and his motion for leave to appeal with supporting affidavit. The Clerk of the Court of Appeals, however, on March 6, 1962, requested the Clerk of the Appellate Division to "forward your complete file relative to the above case" (Cr. D. 93). The Appellate Division then forwarded to the Court of Appeals the file referred to above—containing the original papers on Willner's several applications for admission to the bar (Cr. D. 94-96).

The case was argued orally before the Court of Appeals, Willner being represented by counsel. There was, however, no appearance by the Committee before the Court of Appeals.[2]

Willner's brief before the Court of Appeals, which we have examined, argued that Willner had been denied his constitutional rights in his proceedings before the Committee—it argued that he had been denied confrontation of his accusers and noted that, even now, he could not be sure of the Committee's reasons for refusing to certify him for admission to the bar. The argument in that brief was based upon the facts recited in Willner's Petition to the Appellate Division and in Willner's affidavit in support of the motion for leave to appeal (R. 18-23). Willner's attorney has written the Committee on the Bill of Rights that he was not aware at the time of the submission of the cause to the Court of Appeals that the Appellate Division file was before the Court of Appeals.[3]

The Court of Appeals affirmed the order appealed from without opinion (11 N. Y. 2d 866).

Thereafter, at Willner's request, the Court of Appeals amended its remittitur to recite that

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that he was denied due process of law in

[2] So far as can be gleaned from the reported decisions, no Character Committee has ever appeared before the Court of Appeals, except in the case of *Matter of Anonymous*, 10 N. Y. 2d 740, 219 N. Y. S. 2d 410, where that Court had ordered it to appear. See n. 12, *infra*.

[3] In an affidavit filed by the Attorney General of the State of New York in this Court, verified October 10, 1962, in support of a cross-motion to dismiss the proceeding it is stated (p. 4) that that file was first made available to *him* after certiorari was granted by this Court on June 25, 1962.

violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights." (R. 28)

E. The Petition for Writ of Certiorari

The Petition for Certiorari was filed May 23, 1962. The papers submitted by the Petitioner to the Supreme Court at that time did not include the Appellate Division file which had been furnished to the Court of Appeals at that Court's request, and which, unknown to Willner's attorney, had been part of the record upon which that Court had considered the appeal.

The Petition stated that Willner did not know *why* he was refused admission to the bar, but "surmises" that it was based on affidavits or letters from the two lawyers, Messrs. Wieder and Dempsey, mentioned in his Petition to the Appellate Division, and urged that Willner had been denied due process of law in that the Committee did not require them to appear in person before the Committee, confront Willner, and be subject to cross-examination.

A brief in opposition to the Petition for a Writ was filed on behalf of the Respondent Committee by the Attorney General of New York. That brief was based on matters contained in the papers Willner had filed in the Supreme Court. It made no reference to the Appellate Division file which had been forwarded to the Court of Appeals.

The Petition for Certiorari was granted June 25, 1962 (370 U. S. 934).

F. Designation of Record in Supreme Court; Motion to Dismiss

On July 3, 1962, Willner filed in this Court a designation of the record to be printed in the Supreme Court, designating:

> "The entire record in the proceeding, now on file in your office."

The Attorney General, on July 13, 1962, filed a cross-designation, to include:

> "any portion of the entire record in the proceeding which is not on file in your office."

The cross-designation explained that while Willner's attorney had assured the Attorney General that the entire record would be printed, the Attorney General, if this were not done, would arrange to supply the balance, subject to the following:

> "This will, of course, not include any confidential reports *which may have been acted upon by the respondent-appellee [the Committee] or by any of the New York courts.*" (Italics supplied.)

On October 5, 1962, the Attorney General served an amended cross-designation. This time he listed 96 separate items constituting the Appellate Division file which had been before the Court of Appeals. Willner thereupon served a motion to require the Clerk to print only those papers covered by his earlier designation. On October 12, the Attorney General filed a cross-motion to dismiss the proceeding on the ground that certiorari had been improvidently granted, upon an affidavit of the Assistant Attorney General in charge of the appeal which alleged, *inter alia:*

> "After the Court granted certiorari, the Appellate Division file was made available to the deponent [*i.e.*, to the Attorney General]." (Respondent's Cross-Motion to Dismiss, p. 4.)

That affidavit argued that the Appellate Division file showed that the determinations made by the Character Committee with respect to Willner in 1938 and 1950 were not based upon *ex parte* complaints, but upon Willner's own admitted misrepresentations to the Committee during the course of hearings, his lack of candor, etc. (*id.* at 4-6). The affidavit requested that the Supreme Court should review its grant of certiorari on "the entire file" now before it, and dismiss the proceeding (*id.* at p. 8).

On October 30, 1962, the attorneys for both parties filed a stipulation that the 96 items referred to in the Attorney General's amended cross-designation were to be deemed part of the record before the Supreme Court, but that they were not to be printed. The Attorney General's motion to dismiss the proceeding on the basis of "the entire file" was denied November 13, 1962 (R. 29; 371 U. S. 900).

G. The Record Now Before This Court.

Critical items in the Appellate Division file now before the Supreme Court include the transcripts of Willner's several hearings before the Committee, and the reports on the case written to the full Committee by individual Committee members dated May 16, 1938 (Cr. D. 71), November 4, 1948 (Cr. D. 74), and May 31, 1950 (Cr. D. 76). All of this material was available to the Appellate Division and was actually before the Court of Appeals. It appears from the Appellate Division file that the hearing transcripts had been made available to one of Willner's attorneys in 1950 (Cr. D. 69). It does not appear, however, that the reports to the Committee by its individual members, or by Committee investigators (Cr. D. 8, 23), including analyses of complaints received by the Committee and of Willner's explanations respecting those matters, all of which were in the Appellate Division file, were made available to Willner prior to the issuance of this Court's writ of certiorari. Indeed, the brief of the Attorney General in this Court, referring to what may have been made available to one of Willner's attorneys in 1947, candidly states:

> "Intr Committee and Intra-Court reports were probably not made available [to Willner's attorney], by reason of their confidential aspect" (Brief, p. 34).

The Attorney General, before this Court, relies on the Appellate Division file, which includes those reports, as rebutting Willner's "assumption" that the Committee determined that he lacked the requisite character and fitness

on the basis of the *ex parte* charges of Messrs. Wieder and Dempsey. The Attorney General urges:

> "The record [*i.e.*, the Appellate Division file] clearly shows that the Committee's determination was predicated upon Willner's own questionnaires, affidavits and 'the record' which he himself made upon his appearance before the Committee and by his admitted conduct elsewhere. Whenever the Committee received information *ex parte* or through its investigators, Willner was then given an opportunity to admit, deny or offer an explanation of the material involved" (Brief, p. 65).

In sum, the Respondent argues in this Court that the decisions of the Courts below are to be sustained as consistent with due process on the basis of matters contained in a file which Willner did not know was being considered by those Courts when they were considering his latest Petition.

Summary of Argument

The Court of Appeals having certified that it necessarily passed upon whether Willner had been denied due process by denial of confrontation and cross-examination of the witnesses against him, we think that the constitutional question—on which this Court has granted review and has denied a motion to dismiss—is before this Court.

Bar admission, under New York and federal constitutional law, is a right. New York law provides that bar admission cases are judicial proceedings. Due process in judicial proceedings for the determination of rights requires advance notice of charges and an opportunity to confront and cross-examine one's accusers, and there is nothing either in the nature of the proceeding or the interest to be protected by the state which warrants a departure from these rules here. No case has been cited asserting that notice of charges, confrontation or cross-ex-

amination may be dispensed with in bar admission cases, and a number of state court opinions rule otherwise.

The Attorney General's brief argues that the Character Committee does not rely upon *ex parte* statements furnished to the Committee, but makes its determination on the basis of its appraisal of the applicant's own explanation regarding adverse information supplied *ex parte*. But we think the record and papers here demonstrate that the Character Committee in this case did attach evidential weight to such *ex parte* derogatory information and did not rely exclusively on the Petitioner's statements or responses.

Finally, we contend that due process was denied by the denial to the Petitioner of the right to argue his case in the Court of Appeals on the same record which that Court had before it, which record was not available to Petitioner prior to this Court's grant of certiorari. Consideration of the case upon the basis of a secret record precluded a meaningful hearing, and hence denied Petitioner his right to due process at that stage of the proceedings.

ARGUMENT

POINT I

Petitioner was denied due process of law by the failure to give notice in advance of hearings of the charges against him and the failure to provide for confrontation and cross-examination of adverse witnesses.

A.

A proceeding before the Appellate Division to secure admission to the bar is, under the law of our State, a "judicial" and not an "executive" proceeding. *Cooper's Case*, 22 N. Y. 67, 85.

> "In regard to attorneys, the constitution confers the absolute right of admission upon everyone pos-

> sessing the requisite qualifications. The court is called upon to determine as to the existence of this right. It being ascertained that the applicant possesses the requisite qualifications, his admission follows as a legal necessity. It is certainly clear, as a general rule, that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature * * * " (*Cooper's Case, supra*, at p. 86).

Such proceedings before the admitting court are among the general class of "special proceedings" under New York's Civil Practice Act "for the enforcement or protection of a right, the redress or prevention of a wrong" (NYCPA, §§ 4, 5). *Matter of Mathot*, 222 N. Y. 8, 9; see also *Matter of an Attorney*, 83 N. Y. 164, 166. Orders denying admission to the bar are consequently appealable to the Court of Appeals, *Cooper's Case, supra; Matter of Anonymous*, 10 N. Y. 2d 740, 219 N. Y. S. 2d 410.[4]

Petitioner's application in this case under Rule 1(e) of the Rules of Civil Practice was a judicial proceeding. His basic contention in that judicial proceeding was that he should be permitted to file a new application for admission to the bar because the denial of his earlier applications had been infected by a denial of due process of law, in that the Committee had relied upon *ex parte* statements of two lawyers, denying him confrontation and cross-examination. As the amended remittitur of the Court of Appeals shows, the Court of Appeals entertained Petitioner's claim of such denial of due process on the merits, and decided that claim adversely to Willner. The Attorney-General here argues (Brief, Point I) that the Court of Ap-

[4] However, unless there has been a dissent in the Appellate Division, or unless a constitutional question is involved, the appeal does not lie as of right, and leave to appeal must be first sought. N. Y. State Const., Art. 6, § 7; N. Y. Civil Practice Act, § 588. Review by the Court of Appeals is, as in all cases, limited to questions of law (C. P. A. § 605).

peals was merely reviewing a "discretionary" order, and that the Petitioner "failed, at an appropriate time, to present his constitutional claim." Since the Court of Appeals has certified that it "necessarily" reached the merits of Petitioner's constitutional claim, we think that claim—that he was denied due process of law on his earlier applications for admission to the bar—is here for determination on the merits by this Court.

B.

This Court said in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-39:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment".[5]

See also *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Cohen* v. *Hurley*, 366 U. S. 117, 122. And as this Court pointed out in *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U. S. 886, 895-96, "the right to follow a chosen * * * profession" is a substantial right and not a mere privilege.

Procedural due process must be had, of course, in proceedings for bar admission. Thus, in *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123, this Court said that those seeking admission to the Bar are entitled, as a matter

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[5] In that connection, the Court also said [353 U. S. at 239, note 5]:

> "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. *Ex Parte Garland*, 4 Wall. 333, 379."

Under New York law, of course, the practice of law is a "right". See *Cooper's Case; supra*, p. 18.

of federal due process, to notice of hearing, notice of charges, and the right to answer the charges.

To determine what procedures due process may require, one "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." The governmental function involved here is "the power to regulate or license, as lawmaker, an entire trade or profession." *Cafeteria & Rest. Wkrs. U. Local 473* v. *McElroy*, 376 U. S. 886, 895. But the private interest, "the right to follow a chosen profession" (*id.* at 895-6), is a right, not a mere privilege, both under the *Cafeteria* case (*ibid.*) and under New York law (*supra*, p. 18). And since the proceeding is a judicial proceeding under New York law, it seems clear that trial-type procedures are constitutionally required.

This case does not involve questions of national security such as were involved in *Greene* v. *McElroy*, 360 U. S. 474, *Cafeteria*, *Bailey* v. *Richardson*, 341 U. S. 918 or *Peters* v. *Hobby*, 349 U. S. 331, where the government justified secrecy of the confidential information on the basis of the overwhelming interest in national security—indeed, here it is the governmental authority which divulges in this Court the "confidential" information, surely no less confidential now than when used to deny admission. Nor is there involved here a governmental employee subject to discharge at will who therefore conceivably might have no right to the protections of full due process. An attorney is not in that category. *Ex Parte Garland*, 4 Wall. 333, 378; see the *Cafeteria* case, *supra*, 367 U. S. at 895-6. Neither does the case at bar involve merely the right to work at one specific military installation, as in the *Cafeteria* case—it involves, rather, the opportunity to practice law before all the courts of a state, and before the federal courts which predicate admission to their bars upon admission to state bars. Finally, this is not a situation in which only a general fact-finding investigation is undertaken, where the "full panoply of judicial

procedures" need not be used, or where there is simply an investigation and report by a body, such as a Grand Jury, which "does not try" the factual issues. *Hannah* v. *Larche*, 363 U. S. 420, 442, 449; *cf. Anonymous Nos. 6 and 7* v. *Baker*, 360 U. S. 287; *Cohen* v. *Hurley*, 366 U. S. 117. Here, the Character Committee acted as investigator, reporter, and trier of the facts, in what is an integral part of a judicial proceeding.

In such a proceeding as this, the normal rules of due process must apply, with the result that the applicant is entitled to such rights. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93; *Morgan* v. *United States*, 304 U. S. 1, 18; *Kirby* v. *United States*, 174 U. S. 47, 55, 61; *Motes* v. *United States*, 178 U. S. 458, 467, 471; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 87, 89; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 286-291; *Southern Railway Company* v. *Virginia ex rel. Shirley*, 290 U. S. 190.

Cf. Judge Edgerton, concurring in *Brooks* v. *Laws*, 208 F. 2d 18, 33 (D. C. Cir., 1953):

> "When secret informants have made secret charges against an applicant possibly a Committee on Admissions may decline to recommend his admission, for its action is not final if he chooses to take his application to court. But for a court finally to reject an applicant because of secret charges by secret informants would be as shocking as to disbar a lawyer, or convict a man of crime, on such charges. By innocent mistake or incompetence or carelessness or malice a confidential informant may make false charges. Elementary fairness and therefore due process of law forbid finally rejecting, on grounds of character, an otherwise qualified applicant without allowing him a public opportunity to confront his accusers and refute their charges. The right to a public hearing is also a necessary safeguard against rejection because of charges which are true but irrelevant, *e. g.* that an applicant has unconventional social, political, or economic views."

Greene v. *McElroy*, 360 U. S. 474, 492, 507 makes clear that due process requires confrontation and cross-examination (360 U. S. at 496-499):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny. * * *
>
> "Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:
>
> > 'For two centuries past, the policy of the Anglo-American System of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.'
>
> Little need be added to this incisive summary statement except to point out that under the present clear-

> ance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally."

C.

To our knowledge, no state court which has been confronted by the issue has asserted a principle that undisclosed evidence from witnesses not subject to cross-examination may be used constitutionally against bar applicants.

The Supreme Court of Florida has squarely held that due process is denied by the denial to an applicant of notice of charges and the right to confront and cross-examine. *Coleman* v. *Watts*, 81 So. 2d 650, not officially reported. Other state courts, perhaps motivated by a desire to preserve promised confidences, have held that one is entitled to notice of charges, and that evidence untested by the sword of cross-examination cannot constitutionally be considered against the applicant. Thus, in the case of *Application of Burke*, 87 Ariz. 336, 351 P. 2d 169, the court did not have before it the derogatory information which consisted of a report of the National Conference of Bar Examiners,[6] on the basis of which admission had been denied. The court said (351 P. 2d at 172):

> "We shall not compel the committee to abuse its trust and reveal its sources. This would not only sanction a breach of trust but would dry up its sources and destroy its future effectiveness. However, we cannot allow information of this nature to

[6] The National Conference "does not make character investigation of new applicants for admission to the Bar for any state, except in unusual cases. Whether or not it should do so has been discussed in the past but it was felt that it was beyond the scope of the organization." Letter from Stanley G. Falk, Esq., Chairman of N. C. B. E., to Herbert Monte Levy, Esq., January 11, 1963.

> be used by the committee for the purpose of denying a man due process in so vital a matter as the right to practice his chosen profession. * * * If respectable persons have derogatory information or bona fide charges to level against an applicant, they should not hesitate to come out into the open and speak the truth."

Accord, *Application of Guberman*, 90 Ariz. 27, 363 P. 2d 617; *State ex rel. Bar Examiners* v. *Poyntz*, 152 Ore. 592, 52 P. 2d 1141; *In re Crum*, 103 Ore. 296, 204 Pac. 948.

In *Moity* v. *Louisiana State Bar Association*, 239 La. 1081, 121 So. 2d 87, petitioner had sought an order from the Committee on Bar Admissions of the Louisiana State Bar Association permitting him to study law under the supervision of an attorney. The Committee had refused, asserting that it was not constituted to hold hearings or to permit applicants to question before it the basis for its conclusions as to the character of law students. The Supreme Court of Louisiana concluded (121 So. 2d at 91):

> "[The applicant] is entitled to a hearing, at which he has a right to be present, to be represented by counsel, and to be given an opportunity to hear those matters which formed the basis of the Committee's action, as well as to introduce evidence and cross-examine the witnesses against him, if any."

The Court thereupon appointed a special commissioner to conduct a hearing and report on the matter.[7]

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[7] Such a procedure might also be utilized in New York under the residuum of power granted to the Appellate Division to "make further examination and inquiry through its Committee on Character and Fitness *or otherwise*." (Emphasis supplied; Rule VIII-2, quoted *supra* at p. 6.) In that connection, it might be noted that Petitioner's motion before the Appellate Division dated April 10, 1951 sought, among other things, appointment of "a Referee to hear and report upon the evidence taken before him, as to whether he possessed the character and fitness entitling him to be admitted." Had Petitioner's request in this regard been granted, he would have received a hearing incorporating the "safeguards" that the Supreme Court of Louisiana found to be essential, just as those involved in disbarment or disciplinary proceedings in New York receive a full hearing before a referee.

D.

The Attorney General argues: (1) that to the extent that the Committee received information "*ex parte* or through its investigators," Petitioner was notified of the nature of any such information and "given an opportunity to admit, deny or offer an explanation of the material involved" (Brief at p. 65), and (2) that the Committee in making a determination as to applicants' character and fitness does not rely upon *ex parte* information, but decides solely on its appraisal of the candor and truthfulness of the applicants' answers to questions pertaining to such information (Brief at p. 72).

A review of reports submitted by Committee members to the whole Committee at various times during the protracted period when Petitioner was seeking admission—one of which is reproduced in full as Appendix A to this brief [Ellison Report, May 31, 1950 (Cr. D. 76)]—demonstrates that the Committee had before it a number of charges against petitioner by a number of individuals, including the following:

1. A complaint by Mr. Leo Wieder, an attorney, that Willner's performance as a law clerk had been unsatisfactory (Ellison Report, p. 1).

2. A complaint by Mr. James Dempsey, Jr., an attorney, complaining about Willner's conduct in connection with certain litigation in which Willner was involved (Ellison Report, p. 1).

3. A complaint by a Mr. Sylvester Barone that Willner had been given some $125 in connection with a business transaction, had converted it to his own use, and had not repaid $100 of the sum owed (Ellison Report, p. 2).

4. A complaint by Mr. Wieder that Willner had assaulted him (Ellison Report, p. 4).

5. A complaint by a Mr. Harold Rosenblum that Willner had been guilty of unprofessional conduct as an accountant

in certifying to the correctness of a financial report, and in testifying falsely under oath in a proceeding before a referee that he was a member in good standing of the New York Society of Certified Public Accountants (Ellison Report, p. 6).

6. A statement by a Mr. Robbins, representing a defendant in a slander action instituted by Willner, that he had been unable to serve Willner to collect two judgments for court costs, and that the printer who had printed the record on appeal (presumably for Willner) had not been paid (Ellison Report, p. 9).

These charges, made *ex parte* by persons who did not appear at Committee hearings, who did not confront Willner, and who were not cross-examined by him, are set forth in reports made by individual members of the Committee to the full Committee, the reports recommending that the Committee refuse to certify Willner for admission (see Cr. D. 14 and 76). These reports indicate that the Committee's determinations did not rest exclusively on the nature and quality of Willner's responses to these charges. The reports indicate that, on the contrary, the Committee did, to some extent, consider these *ex parte* statements as themselves establishing the truth of the charges made against Willner, or as establishing the untruth of Willner's explanations or denials. In sum, *ex parte* statements, not subject to cross-examination, were given *evidential* weight. That conclusion, we think, is inescapable from a reading of the reports as a whole, and from the following portions of Mr. Ellison's report appended hereto:

"(a) In connection with Willner's explanation of Wieder's assault charge, the report, having quoted Willner's testimony before the Committee, next states: "Mr. Wieder said that this statement was absolutely false" (Ellison Report, p. 5). If the Committee's determination was to be based exclusively on Willner's testimony, there

would have been no occasion to refer to Wieder's subsequent statements.

(b) The report sets out the details of the nature of Mr. Barone's complaint against Willner—that it was for conversion to his own use of $125 given him in 1938 for a business purpose, and that Willner had given Barone five post-dated checks for $5 each, but had not paid the balance of $100—while Willner's testimony (given ten years later, in 1948) as set out in the report was no more than that he could not recall Mr. Barone or the transaction (Ellison Report, pp. 10-11). Unless some credit was to attach to Barone's *ex parte* statements, there was, we think, no point in describing the substance of those statements.

(c) The report sets out (p. 9) that Mr. Robbins had asserted that, as of February 27, 1948, the judgments for costs in the slander suit were unpaid because he had been unable to serve Willner. The report further notes (p. 9) that Willner's questionnaire, sworn to on May 27, 1948, stated that the judgments had been satisfied, but did not state when they had been satisfied. Unless evidential weight was being given to Mr. Robbins' *ex parte* statements, there was no occasion to set forth his statement that he had been unable to serve Willner.

(d) The report having recited that the final determination of the Committee had been postponed pending determination by the New York Society of Certified Public Accounts of Willner's application for reinstatement to that Society (p. 12), the report states (p. 12) that the Committee had been informed by the Society that Willner had advised the Society that "he could not appear before their Admissions Committee in connection with his application for reinstatement, and that if they did not approve his application in absentia they should return his fee and vitiate his application." Since Willner was not examined by the Committee with respect to his alleged inability to appear before the Society's Admissions Committee, it fairly

appears that the report attaches evidential weight to the information supplied *ex parte* by the Society to the Committee.[8]

We conclude that the record in this proceeding *does* indicate that the Committee, at least until 1950, *did* attach evidential weight to *ex parte* statements, not subject to cross-examination, of matters adverse to an applicant for admission, and did not rely exclusively upon its assessment of the truthfulness or candor of the applicant's own statements or testimony before the Committee. As this Court said, in *In re Oliver*, 333 U. S. 257, 277:

> "It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify."

E.

It is clear that Petitioner was never provided, in *advance* of hearing, with a fair summary of the charges against him which he would be called upon to deny or explain. The Attorney General appears to contend that because the nature of the charges emerged in the course of questioning of Petitioner before the Committee, and because he was given a full opportunity "to admit, deny or offer an explanation of the material involved", there is no violation of due process. But notice of charges that emerges in the course of questioning hardly satisfies the standards

[8] Willner's Petition in the Appellate Division in this proceeding recites that he has been a member of the Society since 1951 (R. 4).

of a fair hearing; reasonable notice must be given in advance of hearing. *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir., 1955); *Roller* v. *Holly*, 176 U. S. 398, 409, 410; *Hecht* v. *Monaghan*, 307 N. Y. 461, 473.[9] Failure to provide reasonable notice in advance is particularly unfair where, as in Character Committee investigations, questions pertaining to most every aspect of an applicant's life may be asked as relevant to the inquiry. Ambiguous questions or misunderstood lines of questioning can result in incomplete answers based on information only half recalled, and easily subject the applicant to seemingly fair charges of evasion and lack of candor and truthfulness.[10] When this absence of fair notice is combined with a failure to afford an applicant an opportunity to confront and cross-examine the witnesses who have submitted the adverse information, it becomes clear, we submit, that the procedural rights afforded the applicant fall short of the protections required under the Fourteenth Amendment. *In re Oliver*, 333 U. S. 257, 273; *Morgan* v. *United States*, 304 U. S. 1, 18-9.

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[9] In a judicial proceeding, even the granting of notice as a matter of favor and grace will not suffice—notice must be provided for in the enabling law to satisfy due process. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424; *Wuchter* v. *Pizzutti*, 276 U. S. 13.

[10] See discussion, *supra*, with respect to the Barone charge of events occurring in 1938, as to which Willner was examined by the Committee in 1948, without advance notice that he was to be examined on the subject.

POINT II

The New York Court of Appeals denied Petitioner due process of law in disposing of his constitutional claim upon a record not available to him.

As noted previously, the New York Court of Appeals requested and received from the Appellate Division the complete file relating to the Character Committee's investigation into Petitioner's fitness to practice law, including transcripts of Petitioner's several hearings before the Committee, various written complaints against Willner, and reports on the case written to the full Committee by Committee members dated, respectively, May 16, 1938, November 4, 1948 and May 31, 1950 (see pp. 10-11, *supra*). It appears clear that at least that portion of that file consisting of reports to the Committee summarizing the results of the Committee's investigations, and recommending that the Committee refuse certification, were not available to Petitioner prior to the Attorney General's amended cross-designation of the record in this Court, filed after this Court granted certiorari.[11]

The vice of the judicial proceedings on Petitioner's instant application is that the New York Court of Appeals determined Willner's claim of denial of federal due process against him on the basis of a record which was not known to or available to him as a litigant.

Having granted Petitioner's motion for leave to appeal on the constitutional questions raised by the motion, and having determined to consider those questions on the appeal, due process of law required that Petitioner have available to him, as a litigant before that Court, the entire

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[11] The Attorney General's original cross-designation specifically noted that some portions of the record before the Court of Appeals might be "confidential" and thus not available to Petitioner even before this Court.

record upon which the Court itself would make its determination.[12] The importance to Petitioner of obtaining access to the complete file maintained by the Appellate Division is indicated by the fact that the Attorney General, before this Court, relies on that file to rebut Petitioner's "assumption" that the Character Committee determined that Petitioner lacked the requisite character and fitness on the basis of *ex parte* charges in that record. Without access to that record, Petitioner obviously was unable to construct meaningful argument on this issue, oral or written, or to

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[12] The difficulties of an applicant before the New York Courts in the light of such a situation were highlighted by the case of *Matter of Anonymous*, 10 N. Y. 2d 740, 219 N. Y. S. 2d 410. In that case, according to the uncontradicted assertions of the applicant's counsel in a brief filed in the Court of Appeals, the Clerk's Office of the Appellate Division, Second Department, advised Anonymous' attorney that there had been no opinion of the Appellate Division; no opinion was published at any time in the New York Law Journal, the daily paper in New York City which normally reports all decisions of the First and Second Departments; in fact, there was an opinion (11 A. D. 2d 917, 205 N. Y. S. 2d 807), which was not published until more than a year after the decision, under the title of *Anonymous*, but which was not in the sealed file of the case in the Court of Appeals. Anonymous' attorney advised the Court of Appeals that he did not know of the existence of the opinion until after oral argument had been commenced in the Court of Appeals. The result was that the oral argument was adjourned and the Character Committee, which had not appeared until that point, was directed by the Court of Appeals to appear by counsel on resumption of the argument. Its attorney (the Attorney General) in his brief used quotations from the confidential reports of the Character Committee, which had been unsuccessfully sought by Anonymous in the Appellate Division. Because of this, Anonymous' request was granted by the Court of Appeals (9 N. Y. 2d 901, 217 N. Y. S. 2d 80), to examine the hitherto confidential file. Upon examination of those papers, Anonymous was permitted to furnish the Court of Appeals with evidence relating to the previously undisclosed charges. The Court of Appeals, with Anonymous' new evidence before it, found "No sufficient basis in this record for denying petitioner application for admission to the bar", and remanded the proceeding to the Appellate Division. 10 N. Y. 2d 740, 219 N. Y. S. 2d 410, 411.

secure a meaningful hearing on the constitutional questions he presented for determination.

In *Chessman* v. *Teets*, 354 U. S. 156, 162, this Court held that *ex parte* settlement of a state court record on appeal violated procedural due process. Clearly, *ex parte* determination that the record on appeal shall consist largely of material not known or available to the litigant during the appeal itself even more clearly constitutes a denial of fundamental procedural rights.

It is, we submit, offensive to principles of due process in the determination of federal questions that the record upon which the Attorney General now asks this Court to affirm the judgment of the New York Court of Appeals on the merits of a constitutional question consists in major part of material which was not available to Petitioner in the Court of Appeals. Assuredly, there can be no serious question that the material which was contained in the file before the Court of Appeals was so confidential as to be not discloseable to Petitioner at that time if, at the special request of the Attorney General, that same material has now been filed in this Court, and provides the raw material for some fifty pages of printed factual material in the Attorney General's brief.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

HERBERT MONTE LEVY,
ROBERT B. MCKAY,
ROBERT PITOFSKY,
HERBERT PRASHKER,
Attorneys for Amicus Curiae.

Dated: February 15, 1963.

APPENDIX A

Memorandum by Mr. Ellison

[1]* *In re: Nathan Willner*

The applicant passed the bar examination in June 1936. He appeared before the Committee on May 4, 1937, and was examined. At that time the Committee had before it a complaint from Leo M. Wieder, an attorney, stating in substance that he had employed the applicant from May 18, 1931, to November 7, 1931, as a law clerk, and that because of absences, late hours and neglect of duties he had asked the applicant to resign because he "had not performed a regular law clerkship in accordance with the Rules." These facts were supported by entries in Mr. Wieder's diary, which were inspected by a representative of the Committee, and there had been filed by Mr. Wieder with the Court of Appeals a certificate of commencement of clerkship stating that the applicant had entered his office to serve a law clerkship. In his sworn questionnaire the applicant stated that he had never been employed in any law office. Further consideration of the application was deferred pending the result of investigation.

In December 1937 the Committee considered a letter received from James Dempsey, Jr., an attorney of Peekskill, New York, complaining about the applicant's conduct in connection with certain litigation in which the applicant was involved and which litigation he failed to disclose in his questionnaire or in a subsequent affidavit filed by him bringing the answers to his questionnaire up to date. Further consideration was deferred pending the result of investigation of Mr. Dempsey's complaint.

When this investigation was completed, a report dated May 16, 1938, was filed by Mr. Jackson, a member of the

* Indicates page number of report in original form in which it appears in Court record (Cr. D. 76).

Committee, reviewing the facts involved up to that time and recommending, on the record and the misrepresentations made by the applicant, that his application be denied.

The applicant was then recalled and examined with [2] reference to the complaint of Mr. Dempsey and the information contained in the report of investigation.

While the application was being considered by the Committee, the applicant's wife asked that the applicant be given a further hearing. Her request was granted and the applicant was again recalled. At the conclusion of this examination the Committee concurred in Mr. Jackson's report and recommended denial of the application.

Subsequently the applicant's wife asked if she might appear before the Committee on behalf of her husband. She appeared before Mf. Jackson and made a statement on the applicant's behalf.

On November 22, 1938, a formal report denying the application, signed by all ten members of the Committee, was filed with the Court.

After the Committee had filed its report a letter was received from a Mr. Sylvester Barone dated January 25, 1939, stating in substance that in 1938 he had given the applicant $125.00 "to be used as a deposit in a business transaction" and the applicant "converted this money to his use." The Committee's report having already been filed with the Court, this complaint was not investigated at the time it was received. Mr. Barone, however, was subsequently interviewed and stated that in 1939 the applicant gave him five post-dated checks for $5.00 each and that the balance of $100.00 had not been paid, nor had he seen the applicant since he had given him the $125.00.

Under date of February 27, 1939, the Committee received from James Dempsey, Jr., the Peekskill attorney, a mimeographed letter apparently sent by the applicant to Mr. Francis H. Klein, Exalted Ruler of the B.P.O.E. of Peekskill, to the editor of the Peekskill Evening Star, and

several residents of Peekskill, the contents of which Mr. Dempsey referred to as "libelous."

Under date of March 23, 1939, the Committee received from Mr. Julian D. Cornell, at that time a member of the Junior [3] Bar Committee of the Association of the Bar of the City of New York, which Committee was sponsoring a reception to recently admitted members of the Bar, a letter addressed to him by the applicant asking that he explain to the "neophytes" being welcomed to the legal profession "why I was not one of the successful candidates." The applicant's letter to Mr. Cornell continues:

> "Would you point out to them the cowardly attribute that is manifestly concerned with a body of men who monopolize the very existence of a human being endowed with learning and ambitions, devoid of any personal aggrandizement that the Character Committee reaps?
>
> Do you know of any system of jurisprudence with but any taint of justice, where a judgment is rendered without any reason, but merely steeped in stealth?
>
> When you have done that, could I, the victim, be made aware of the admeasurement of administration of justice whereby my adverse decision was reached?"

Under date of April 7, 1939, the late Presiding Justice Francis Martin received a letter from the applicant from which the following is quoted:

> "For over *two years* my application before the Character Committee had been pending.
>
> There were some few sittings before five men at which I attended from time to time, but on each occasion they took on a more peculiar aspect, steeped in some fine spun sophistries that were so obviously

prejudicial, that the subtlety they intended, were limp from loss of vitality. * * *

Then the ending off with *my inquiry* as to when the Committee would call me again, only to receive a letter in reply for the *very first time* that my application had been rejected.

No reason—no excuse—nothing. Five men with a collected experience of about 150 years, jockeyed and bandied my name about for two full years before the clerk made up their minds for them."

A similar letter was sent by the applicant to the other Appellate Division Justices.

Under dated [sic] of June 2nd and 12th, 1939, the applicant sent letters to Fred L. Gross, Esq., of the State Bar Association, and under date of June 12, 1939, wrote a similar letter to [4] Charles J. Buckner, Esq., of the State Bar Association, from which the following is quoted:

"With whatever ounce of energy you can muster in your being, you must in the name of true administration of justice add your voice against the cowardly method of unethical procedure in rejecting candidates to the Bar.

May I state that I am prepared to testify before your committee at my own expense, anwhere in the State of New York, in reference to my case—similar no doubt, to many others—whereby the Committee of Character and Fitness can be proven to be steeped in stealth; unethical in every sense of the word; political henchmen of a system of greediness which guarantees economic security to themselves alone; harboring the temerity to deprive rights without the necessity of stating reasons or conclusions of their particular findings; keeping the standards of attainments for admission castled in their own confines, in

order to cloak their contemptuous determination in their exclusionary guillotine."

Under date of December 12, 1939, the Committee received from Leo M. Wieder, the attorney who originally complained against the applicant, a letter stating that the applicant had "severely assaulted" him on December 8, 1939. The applicant explained this incident in the questionnaire as follows:

> "The case was adjourned on about ten occasions at least, because Mr. Wieder would run out of the court shortly before we were to appear before the Judges. On the last occasion, Judge Irving Ben Cooper, who was presiding, ordered Mr. Wieder to remain in Court and not to leave under punishment for contempt. Mr. Wieder remained and was ordered to the witness stand. There he RETRACTED his charges and the case was dismissed."

Mr. Wieder said that this statement was absolutely false; that he never absented himself from the Court; that adjournments were not more than three or four, and that he did not seek any of them; that when the case finally came to trial and he appeared on the witness stand, the Court asked him why he was withdrawing the charge, and he stated it was on the written promise of the applicant that he would not further annoy him.

On January 20, 1943, the applicant moved the Court for a rehearing and the Committee filed with the Court a memorandum setting forth the facts upon which the application had [5] been denied.

On February 16, 1943, the Court denied the applicant's motion for rehearing.

On January 16, 1948, the applicant served on the Committee copy of a petition and notice of motion for a rehearing. On this occasion the Committee did not file a memorandum for the information of the Court.

Appendix A—Memorandum by Mr. Ellison

On February 9, 1948, the Court granted applicant's motion "in so far as to refer petitioner's application to the Committee on Character and Fitness for rehearing."

On February 13, 1948, the following letter of complaint was received from Mr. Harold H. Rosenblum, an accountant:

> "It has been my displeasure to meet up with Mr. Wilner on several occasions in the course of my practice. I herewith take this opportunity to state that Mr. Wilner has demonstrated unprofessional conduct, unbecoming a member of a learned profession, by certifying to the correctness of a financial report he has prepared and submitted to an official Referee, the results of which were based not on facts, but on the conjecture and the personal opinion of Mr. Wilner.
>
> Furthermore, in October, 1947, while a witness before Official Referee, the Honorable John P. Cohalan, he testified under oath that he was a member in good standing of the New York State Society of Certified Public Accountants. He again repeated this testimony in November 1947 before the same referee. Subsequent investigation disclosed the fact that he was not a member of said society for many years, and he still is not a member of the New York Society of C.P.A.'s now.
>
> It is therefore my considered opinion that Mr. Wilner is not a fit person to be admitted into your honorable body."

Upon receipt of the letter, the Committee's representative talked with Mr. Rosenblum on the telephone and was informed that in certain proceedings before Offical [sic] Referee Cohalan the applicant had testified on behalf of the plaintiff in an action entitled John Alders and Curtis M.

Marx vs. Ora W. Grow; that among other things the applicant testified that he was at that time (July 1, 1947) a certified public accountant and was a member of the New York State Society of Certified Public Accountants. The following are excerpts from the [6] stenographer's minutes of the applicant's testimony before the Referee:

"*Direct examination by Mr. Windsor*:

Q. Are you a certified public accountant? A. Yes, I am.

Q. And are you any—a member of any society of certified public accountants? A. Yes, I am.

Q. What society? A. New York State Society of Certified Public Accountants.

Q. For how long a time have you been a member of the Society? A. Well, I started in 1936 and due to the lapse of my illness I let things lapse. Then I was reinstated and I am a member in good standing today.

Q. I show you this paper, Mr. Willner, and ask you what it is? A. That is my certificate issued to me from the New York State Society of Certified Public Accountants showing that I was a member since the sixth of March 1936 and I was reinstated as such.

Mr. Windsor: I offer that in evidence.

The Referee: You don't need it. I will take it without putting it in. Just make it as a statement unless they object to it on the cross-examination. You may want to keep that certificate. Show it to your adversary."

(NOTE: S.M. pp. 238-239. Then followed a colloquy about a slander suit brought by Willner against Hermelin for $25,000, reference to which will be made later on in this report.)

Appendix A—Memorandum by Mr. Ellison

October 16, 1947.

"*Cross-examination by Mr. Harmelin:*

Q. You testified that you are a certified public accountant, Mr. Willner? A. Yes, sir.

Q. How long have you been such a certified public accountant? A. Since January 3, 1936.

Q. And you are a member of the State Association of Accountants? A. The New York State Society of Certified Public Accountants; I am a member.

Q. Are you a member in good standing? A. Yes, I am.

Q. Since when have you been a member in good standing of this Society of Public Accountants? A. I have their certificate since, I believe, 1936.

[7] Q. Have you ever been dropped from membership for any time? A. I did not. I let my dues lapse. But in view of the fact that you raised the question I have got myself reinstated. I am a member in good standing.

Q. When were you reinstated as a member in good standing? A. Oh, a couple of months ago.

Mr. Carew: Your Honor, I think I will object to this line of questioning. I do not think he has to belong to that organization to be a certified public accountant.

Mr. Hermelin: It is a question of credibility.

The Referee: That he does not belong?

Mr. Hermelin: That's right.

The Referee: Would you say that any lawyer who did not belong to the Bar Association was not a qualified attorney?

Mr. Hermelin: If he testified that he did and he did not he would be guilty of perjury, wouldn't he?

The Referee: Take him to the District Attorney then.

Mr. Hermelin: We will prove that.

The Referee: You won't prove that before me. I am not trying anybody for perjury.

Mr. Hermelin: It is a question of credibility. That is the only purpose of my offering it before your Honor.

The Referee: What was the motion made?

Mr. Carew: I will withdraw the objection, if that is what he wants it for." (S.M. pp. 288-290.)

In Connection with the applicant's statement that he was at the time of his appearance before Referee Cohalan a member of the New York State Society of Certified Public Accountants, a representative of the Committee interviewed Miss Mary C. Tully, the Office Manager of that Society, and received from her the following information: The applicant became a member of the Society on February 20, 1936; was dropped for non-payment of dues March 31, 1940; was reinstated May 13, 1940; dropped for non-payment of dues March 17, 1941; applied for reinstatement on June 20, 1947.

[8] On June 11, 1948, the Committee's representative interviewed Mr. Wentworth F. Gantt, Executive Secretary of the New York State Society of Certified Public Accountants and was informed:

> "* * * that a complaint was filed by a member of the Society concerning his statement, under oath, in the Supreme Court Case of John Alders et al. vs. Gros that he was a member of The New York State Society of Certified Public Accountants in good standing having been reinstated as such."

Mr. Gantt further stated that the applicant's application for "readmission to the Society is being held up for further investigation by our Committee on Admissions."

(Note: In his questionnaire verified May 21, 1948, under Q. 20, which asks for the names, addresses, etc., of every group, association, society or organization of which he is or had been a member, the applicant makes the following statement: "N. Y. State Society of C.P.As—15 E. 41 St., N. Y. C.—12 years.")

In the slander suit hereinbefore referred to brought by the applicant against Marc Hermelin, the attorney who represented the defendant in the litigation before Referee Cohalan, the complaint was dismissed and judgment obtained against the applicant for $49.50 upon the dismissal of the action on the record on motion, and $40.46 upon affirmance of the order and judgment of the Supreme Court dismissing the complaint on motion.

On February 27, 1948, Mr. Robbins, who represented Mr. Hermelin in the slander action, stated that they had been trying to serve the applicant to collect the two judgments but had not been able to do so. Mr. Robbins also stated that the printer who printed the record on appeal had recently telephoned him and stated that he had not been paid for printing the record on appeal.

(Note: In his questionnaire verified May 27, 1948, the applicant referred to these judgments and stated that they had been satisfied but did not say when they were satisfied.)

In a questionnaire issued to the applicant on February 20, 1948, and filed on May 21, 1948, the applicant reported seven [9] cases of civil litigation in which he was involved, and that in one instance he charged Mr. Wieder with simple

assault; in another he filed a cross-complaint for simple assault against a man named Silverstein; and a complaint against one Hymie Drath for attempted assault. He also reported that he had borrowed $1,080.00 from the National City Bank on which there was still due $270.00 to be paid in three instalments.

To Q. 25 of the questionnaire, which asks whether, if admitted, he intends to practice law, he makes the following statement:

> "I intend to practice in conjunction with my accounting practice as a tax practitioner."

Pursuant to the order of the Appellate Division granting a rehearing, the applicant was recalled and examined at length by the Committee on June 16, 1948, on the record, questionnaire and other papers filed by him on May 21, 1948, after his petition for rehearing had been granted.

On his appearance before the Committee, when told the Committee would be glad to hear any statement he had to make as to why the Committee should change its recommendation to the Court, he made the following statement (S.M. p. 45):

> "Well, I seek to retrieve my reputation in the field that I practice. I don't want to be alluded to as a disbarred attorney. I want to clarify my reputation with my children * * * and I want to be a free man amongst men. I feel I ought to be given some consideration. Eleven years have passed, I have done everything I possibly could to stay out of the courts and be as ethical as I know. * * * The one thing I look forward to is to retrieve this right. I don't think I will ever practise in the profession. I want to continue in my own profession and be a Certified Public Accountant."

Appendix A—Memorandum by Mr. Ellison

Concerning the letters hereinbefore referred to as having been written by the applicant to the late Presiding Justice Francis Martin, Julian D. Cornell, Fred L. Gross, Charles J. Buckner and others, the applicant admitted writing and sending them, because "he had a strong resentment at that time" but was "willing to retract it in any way", even publicly.

Concerning the complaint of Mr. Sylvester Barone, [10] heretofore referred to, the applicant testified before the Committee as follows (S.M. pp. 63-63):

"*By Mr. Jackson*:

Q. Did you have any controversy with a Mr. Sylvester Barone? A. Controversy?

Q. About 1938 or 1939. A. Sylvester Barone? 1938 or 1939?

Q. Yes. Do you recall Mr. Barone? A. Not offhand, no.

Q. Do you recall his giving you $125 as a deposit in a business transaction? A. A business transaction? Not that I recall.

Q. And that thereafter Mr. Barone tried to get the money back and you gave him five post-dated checks for $5.00 each? A. Barone?

By Mr. Ellison:

Q. You got $125 as a deposit in a business transaction from Barone. A. 1939, is that it?

Q. 1939. January, 1939.

By Mr. Muldoon:

Q. Do you know Mr. Barone? A. The name is not familiar to me, that's the only thing. I wouldn't deny anything.

By Mr. Jackson:

Q. Do you recall in 1939 giving Mr. Barone five post-dated checks for $5.00 each? A. I might have. I'm not certain of the name, that's the only thing I'm doubtful about.

By Mr. Ellison:

Q. Did you have such a transaction with anyone that you recall about that time and receiving $125 in cash as a deposit for a business transaction and giving him five post-dated checks for $5.00 each when he asked for the return of his deposit? A. Possibly. I don't know."

At the conclusion of the examination the applicant was requested to file certain additional papers.

On November 10, 1948, he was recalled and after further examination the Committee voted to withhold decision pending the result of action by the New York State Society of Certified Public Accountants on the application for reinstatement, and the outcome of pending litigation in which he was a witness before Referee Cohalan, and in connection with which [11] the attorney Marc Hermelin contemplated bringing the matter to the attention of the District Attorney with respect to applicant's misstatements concerning his membership in the New York State Society of Certified Public Accountants.

Recently the Committee was informed by the New York State Society of Certified Public Accountants that the applicant had told them he could not appear before their Admissions Committee in connection with his application for reinstatement, and that if they did not approve his application in absentia they should return his fee and vitiate his application; that the Committee would not ap-

prove the application without an interview and his application for reinstatement and the fee were returned.

The Committee has also been told by Mr. Hermelin that the litigation heretofore referred to is still unsettled and that it is questionable whether he will refer the applicant's testimony in that litigation to the District Attorney's office.

As the record stands, it would seem to me that this matter should now be disposed of. I am of the opinion that the applicant does not possess the necessary character and fitness for admission to the Bar, and, therefore, recommend that the Committee adhere to its original decision denying the application.

s/ MILLARD J. ELLISON.

Dated: New York, May 31, 1950.

IN THE

Supreme Court of the United States

No. 140, OCTOBER TERM, 1962

NATHAN WILLNER,

Appellant,

vs.

COMMITTEE ON CHARACTER and FITNESS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN REPLY TO *AMICUS*

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF IN REPLY TO *AMICUS*

This brief is submitted in reply to that to be filed *amicus* by a divided single committee of the Association of the Bar of the City of New York. No other bar association or committee thereof has deemed it appropriate to attempt to take a position as to any issues which *may* be involved on this appeal. Nevertheless, and despite the extremely tardy appearance of this committee in this proceeding (five days before the argument of the case is scheduled before this Court) the Respondent, on February 15, 1963, *consented* to the filing of the *amicus* brief.*

* In our main brief, we have referred to the Committee on Character and Fitness as "The Committee". To avoid confusion, we shall refer to The Bill of Rights Committee as either the "*amicus*" or the "B-Rt Committee". The preparation of this response is predicated upon a proof received February 15, 1963 and upon the assumption that the *amicus* brief to be served and filed February 18, 1963 will be the same as the proof.

Outline of Reply to *Amicus*

The B-Rt Committee has overlooked the fact that the Respondent functions primarily as an *investigator*. *Admissions* to the New York Bar are granted or denied *only* by the Appellate Division, which has not surrendered to the Respondent any of its *judicial* functions.

The effectiveness of the Respondent as an investigator would be seriously hampered by requiring it to notify in advance all applicants of any subject under investigation and to require all complainants to appear in person to present their complaints against any applicant in his presence, and to be subjected, in addition, to cross-examination.

The B-Rt Committee has also overlooked the fact that the petitioner failed, at an appropriate time, to raise before the New York courts his present (also 1954) claim that he had been deprived of due process. In addition, it has neglected to observe that he failed to utilize available New York procedures even to obtain or to ascertain the contents of the record upon which he knew or should have known the New York courts would dispose of his present petition for leave to renew his application for admission to the New York Bar.

1. B-Rt Committee has overlooked the fact that Willner did not seek to employ available New York procedures to "ascertain" the record upon which the Court of Appeals reviewed his petition.

The B-Rt Committee has asserted for the appellant a right which he did not seek to assert. We do not know how much of the papers or records were known to the appellant or his counsel prior to the Court of Appeals argument. But, *if* the appellant proceeded in ignorance of any essential record fact before that Court, this was not the fault of the Court of Appeals.

A.

In 1954, in appellant's brief to the Court of Appeals, in support of a motion for *reargument of* a motion for leave to appeal to that Court, appellant's present counsel indicated his then awareness that the Court had before it the Respondent's *entire record* as of that date. In his brief in support of reargument, he stated in November, 1954 (p. 3):

> "It may be, that this court, *having examined the entire record*, was satisfied the Committee was justified in its determination." (Italics supplied)

In support of his original application for leave to appeal to the Court of Appeals in 1954, Willner had asserted (p. 8):

> "An *examination of the record* in this matter will disclose the fact that I denied the accusations made by the two lawyers mentioned." (Italics supplied)

At the least, petitioner knew that there was a record of his proceedings before the Respondent.

B.

Even if we assume the appellant did not have full knowledge of the record before the Court of Appeals, no constitutional question arose as a result of his attorney's willingness to argue his questions of law, without resort to that record; or by reason of his attorney's failure to make the necessary application to the Court of Appeals to obtain such information.

Indeed, as the *amicus* points out (Br. p. 31, footnote), the New York Court of Appeals has the power and has exercised its discretion, *when that discretion has been invoked*, to grant an applicant's request to permit a complete examination of his file, in order to aid the Court of

Appeals upon an applicant's appeal to it. See *Matter of Anonymous*, 9 N. Y. 2d 901 (1961), where the Court of Appeals wrote (p. 902):

> "Motion for leave to examine the confidential record in this proceeding granted and appellant and his attorney permitted to examine the minutes of the hearing of June 6, 1958 and the reports of the individual members of the Character Committee made subsequent thereto in the office of the Clerk of the Court of Appeals."

Willner must be presumed to have known of the foregoing decision, published almost a year *before* he obtained leave to appeal to the Court of Appeals.

Upon the instant petition, the New York Court of Appeals granted the appellant leave to appeal to that Court. There is nothing in the record to show that the same Court, if application had been made, would have denied appellant or his counsel access to all the papers that had been transmitted to that Court. *No such application appears to have been made.*

Nor do we know of any New York decision which would have precluded the Court of Appeals from granting any such order. On the contrary, Judiciary Law, § 90, subd. 10, specifically empowers even the "justices of the appellate division * * * in their discretion, by written order, to permit to be divulged all or any part of" the "papers, records and documents upon the application or examination of any person for admission". This power of disclosure has been exercised by the Appellate Division as well as the Court of Appeals in appropriate cases. See *Matter of Appleman*, 280 App. Div. 939 (2d Dept., 1952); where, upon motion, disclosure was permitted "to the extent of permitting the applicant to examine and copy, under supervision of the clerk of this court or the secretary of the Character Committee, all papers on file with said committee and clerk, excluding, however, all confi-

dential reports of the committee and the court or any member thereof, and excluding also any other matter of a confidential nature contained in such filed papers."

2. The Respondent is primarily an investigator and then a reporter, not a trier of facts.

The B-Rt Committee bases its request for reversal of the Court of Appeals order upon the erroneous assumption that the Respondent, in the performance of its duties "acted as investigator, reporter and trier of facts, in what is an integral part of a judicial proceeding" (*Amicus* Br., p. 21).

We, too, would like to up-grade our client, but the fact is that the *Respondent* is *not* empowered to exercise a *judicial* function, by *denying* any application for admission to the Bar. Its function is primarily *investigatory* (Rule 1). It may issue a *certificate* that a person is "entitled to admission" (Rule 1). Unquestionably, it has the incidental power to make reports and recommendations to the Appellate Division. *But only the Appellate Division, itself,* however, *has the power to admit or deny admission to the Bar* (Judiciary Law, § 90, subd. 1, par. "a").

If the Respondent or any other New York Character Committee were to withhold a certificate *arbitrarily*, New York has a procedure to correct such *arbitrary* action. We have no doubt that, under *such* a set of facts the Appellate Division or Court of Appeals, acting *judicially*, could compel the Respondent to issue a certificate. New York Civil Practice Act, Article 78.*

Formal admission proceedings are conducted by the *Appellate Division*. Applicants attend personally before

* See, e.g., *Slotnick* v. *Hilleboe*, 149 New York Law Journal No. 12, p. 17, January 17, 1963, where such procedure was utilized, in an attempt to compel the amendment of a coroner's death *certificate*, to recite the cause of death as "accidental," rather than occasioned by "myocardial infarction," but where the petition failed to show the coroner had been *arbitrary*.

the Court and are admitted, upon motion and a statement by the Chairman of the Respondent or some other member thereof that the applicants have shown themselves to be entitled to admissions.

The Respondent serves a function akin to that of the barrier which railroads have been required to maintain across grade-crossings. The Respondent lifts this barrier and, in effect, gives the Appellate Division a green light signal to sanction the forward progress of an applicant to the assumption of the many responsible duties of a member of the New York Bar *if its investigation discloses* no danger in allowing such admission. Then the Respondent (as it can and does in almost all cases), certifies that the applicant is "entitled to admission". But when its investigation discloses a danger or risk, the Respondent's barrier (no certificate) remains in place, subject, however, to being removed by the Appellate Division itself when and if the Court in convinced that the danger or risk reported by the Committee does not exist or has been removed (Rule 1).

We may suggest, too, that the Respondent's duty is also analogous to that of a physician checking upon the physical well-being of a patient before the issuance of a health certificate. We doubt whether a physician would be deemed guilty of arbitrary action if he refused to issue a certificate of *good* health to a person, who, at the time of the examination, clearly showed symptoms of tuberculosis, hepatitis or cancer. Separate analogous questions, depending upon circumstances, might be presented: 1) as to whether such a person might be *entitled*, at a later date to a physical re-examination; and 2) as to whether the nature of the disease, once exposed, could be shown, by expert opinion, or otherwise, to have been cured or curable.

To a certain extent, the *amicus* has appeared to recognize the limited function exercised by the Respondent. It has taken no position as to Willner's qualifications "for ulti-

mate admission to the bar" and concedes that this is "a matter for determination by the Committee on Character and Fitness and by the courts of New York * * *" (B-Rt Br., p. 3).

The New York statutes and rules (Appellee's Br., pp. 3-8; *Amicus* Br., pp. 4-7) clearly indicate a reservation to the *Appellate Division* of the power to *determine* who shall be admitted to membership in the New York Bar. These provisions also clearly place with the *Appellate Division itself:* jurisdiction over all papers relating to an application for admission; the power to disclose such papers; and the entertainment of any request for permission to renew an application for admission.

3. The *amicus* overlooks the fact that the appellant failed at an appropriate time to assert that the respondent's investigative procedures impaired his alleged constitutional rights.

The *amicus* appears to have disregarded completely this Court's doctrine that constitutional claims must be raised at the first available opportunity. Even Willner's petition to the Appellate Division upon the instant application for leave to renew his application for admission to the Bar was predicated, not upon constitutional grounds, but upon allegations of *conspiracy* (R., 2-12). Moreover, the record shows the following additional reasons for not permitting the appellant at this time to obtain a disposition of constitutional questions by this Court:

1. He does not appear to have sought any direct court review upon constitutional or other grounds after the Respondent had declined in 1938 to grant him a certificate of good character.

2. He does not appear to have sought direct court review upon constitutional or other grounds of the Respond-

ent's refusal to issue him a certificate of good character in 1950.

The appellant undertook other, abortive proceedings to obtain *rehearings* at dates substantially distant from the dates of the Respondent's denials. He did not, however, afford the Appellate Division itself an opportunity to accord him any such hearing, with confrontation and cross-examination of witnesses at a time when it was likely that these witnesses would be alive, available and when their recollection of the subject matter of their testimony would not have faded.

New York Judiciary Law, § 90 makes the disclosure of proceedings before the Character Committee *discretionary*. That discretion too, does not appear to have been invoked by the appellant here at an appropriate time. Furthermore, he was not *later* entitled, as a matter of absolute *right*, to obtain what he might at one time have obtained as a matter of *discretion*. See *Pittsburgh Plate Glass Co. v. U. S.*, 380 U. S. 395 (1959), where this Court said (at p. 401):

> "The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted an absolute right, a right which we hold they did not have."

4. The performance by the Respondent of its investigative duties would be hampered by a requirement that applicants be granted notice in advance of the charges in any complaints filed against them.

The *amicus* suggests that the procedures which have traditionally been used by committees such as the Respondent in connection with their investigation into the character of applicants for admission to the Bar be abandoned and that there be substituted for the procedures traditionally

used the same procedures which have been utilized in connection with proceedings to disbar attorneys (B-Rt Br., p. 2). We submit that the *amicus* has succumbed to a certain amount of confusion in relation to the functions to be served by a committee such as the Respondent. As we have stated, that function is primarily *investigatory*. See *Hannah* v. *Larche*, 363 U. S. 420, 440-453 (1960), distinguishing between the procedures required to be followed as to adjudication and investigative functions.

The Respondent's service to the community depends, to a great extent, upon its continued ability to maintain the secrecy of its proceedings. See *United States* v. *Procter & Gamble*, 356 U. S. 677, 681-682 (1958), where it was recognized that the "indispensable secrecy of grand jury proceedings" must not be broken except where there is a "compelling necessity". See also *Anonymous* v. *Baker*, 360 U. S. 287, 290-291 (1959); and see also *Pittsburgh Plate Glass Co.* v. *U. S.*, 380 U. S. 395, 400 (1959), where it was held that even under Rule 6(e) of the Federal Rules of Criminal Procedure, a "particularized need" for Grand Jury testimony had to be shown by the defense, which outweighed the policy of secrecy.

Traditionally, the New York courts have treated rejections of applicants with considerable delicacy. *Anonymity* of the applicants has been preserved, as have any charges against them, wherever possible. See, for example, *Matter of Anonymous*, 205 N.Y.S. 2d 740 (1961). These secrecy provisions have been sustained against constitutional attack, when employed in another context—with relation to a general investigation into "alleged improper practices at the local bar". *Anonymous* v. *Baker*, 360 U. S. 287, *supra*, where the duties of even an investigating State Supreme Court Justice were stated by Mr. Justice HARLAN to be (p. 291):

> "purely investigatory and advisory, culminating in one or more reports to the Appellate Division upon which future action may then be based."

He continued (p. 291):

> "In the words of Mr. Justice CARDOZO, then Chief Judge of the New York Court of Appeals, the proceedings at Special Term thus simply constitute a 'preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right . . . a quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter. . . .' *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 479, 162 N. E. 487, 492."

The analogy to grand jury proceedings of the type of investigation involved in *Anonymous* v. *Baker* is, we submit, equally apposite here.

The considerations for preserving the traditional methods of examining bar applicants have also been set forth by Mr. Justice HARLAN in the second *Konigsberg* case (366 U. S. 36, 41-42), even though a character committee's investigations are *specific* rather than *general*.

To what we have stated on this subject in our main brief (p. 68), we need add, in response to the *amicus*, simply that Character Committee interrogation might be rendered worthless, if applicants were apprised in advance of the committee's proposed line of questioning. Claims of surprise, or truly faulty recollection by an applicant as to a subject matter being investigated, would not present constitutional questions. They would simply be the basis of a request for an *adjournment*, so that an applicant, unprepared on original questioning, could be afforded a further opportunity to meet any issue presented or supply any information which he might require additional time to obtain.

5. The thrust of the *amicus* against the 1950 Ellison report is misplaced.

The principal basic upon which the *amicus* has predicated its interest in this case is that one of the reports,

made in 1950 by Mr. Ellison, one of its members, to the full Committee referred to certain facts not set forth in the appellant's questionnaire or in his testimony. To that extent, and possibly further, the Respondent is stated to have given evidential weight to *ex parte* statements which were not subject to cross-examination. Several simple answers, we submit, are available to meet the *amicus* position.

First, the Respondent is not limited by constitutional law, or otherwise, to obtaining its information from or through an applicant.

Second, the procedures which might be required to be followed in connection with the admission, of a person already admitted to a local bar or duly licensed as an accountant, to practice before the tax court or other administrative body, are not the same as those which traditionally, as a matter of due process, have applied to the admission of attorneys, in the first instance, to a local bar. *Cf. Goldsmith* v. *Bd. of Tax Appeals*, 270 U. S. 117 (1925), with *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961). The fact that the appellant had already been admitted to practice in another profession did not entitle him to any different procedure on admission to the New York Bar. So far as the Appellate Division was concerned, he was still a new applicant. And any favorable presumption that might flow from his continued membership in another profession was still subject to dissipation when matters came to the Respondent's attention which presented questions as to the appellant's character. The fact that disciplinary action had not been taken against him in one profession did not grant him *carte blanche* to enter another profession. The lack of disciplinary action may have signified simply the failure of the disciplinary machinery in the other profession to function effectively.

Third, the Ellison memorandum was *merely a report and recommendation to* the Respondent. Partly, it was a

recapitulation of matters previously reported. Principally, and we do not gather that the *amicus* disputes this, it was an account of the appellant's own conduct and admissions. To the extent that it contained references to *ex parte* statements, those references clearly appear to have been made to rather trivial and incidental matters. To that extent, we submit, that the Respondent (whose experienced membership may be deemed to have been as equally concerned with the integrity of its decisions and fairness to applicants as is the B-Rt Committee) may not be assumed to have been incapable of, unwilling or, even unlikely, to make the same distinctions which have been made by the *amicus* between tested and untested allegations. We have annexed hereto a copy of a letter, dated 27 November, 1962, written to Herbert Brownell, the current President of the Association of the Bar of the City of New York, indicating that the Respondent's practice has been *not* to rely on *ex parte* statement (Appendix A) and stating flatly (*infra*, p. 12):

> "No applicant is ever turned down on *ex parte* information."

Fourth, as stated by Judge EDGERTON, in *Brooks* v. *Laws*, 208 F. 2d 18 (D. C. Circ., 1953), in the quotation cited by the *amicus*, even secret charges, not revealed to the appellant, might have been an appropriate basis upon which the Respondent could "decline to recommend his admission" for its action is not final if he chooses to take his application to court (208 F. 2d, at p. 33).

Fifth, the appellant did *not* (either in 1938 or 1950) take his application to the Appellate Division to protest the use of *ex parte* statements. For brevity, we refer to our main brief for a statement of the legal measures which he chose to employ instead.

Sixth, by reason of the appellant's failure to "take his application to the Court", promptly after his rejection in

1950, we do not have from the New York courts any *pronouncement* that, under all the circumstances revealed by appellant's record, a trial-type hearing should have been granted as to any or all of the issues which may have been presented by the record. We can only speculate on what might have been done by the Appellate Division or the Court of Appeals, if the appellant had chosen then to review directly the Respondent's June 9, 1950 determination that it could not certify the appellant for admission. We need note only that this same Appellate Division has been particularly astute in preventing *ex parte* evidence from being employed in license revocation proceedings. *Matter of Cianelli* v. *Dept. of State*, 16 A. D. 2d 352 (1st Dept., 1962).

Seventh, upon the present record it would seem appropriate to paraphrase Mr. Justice Douglas' dissent in *Chessman* v. *Teets*, 354 U. S. 156, 172 (1957), a capital case, by stating that, in any event, whatever may be "the ideal of due process * * * the facts of this case cry out against its application here". Cf. *Dickinson* v. *United States*, 346 U. S. 389, 396 (1953).

CONCLUSION

The order of the Court of Appeals should be affirmed.

Dated: New York, N. Y., February 19, 1963.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for the Respondent

Paxton Blair
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Assistant Attorney General

APPENDIX A

SUPREME COURT

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

OFFICE OF COMMITTEE ON CHARACTER AND FITNESS

JOSEPH F. HIGGINS, Secretary

51 Madison Avenue, New York 10, N. Y.

LW:EA 27 November 1962

Herbert Brownell, Esq.
25 Broadway
New York City 4

Dear Herb:

As you know from our telephone conversation of a day or two ago, I am grateful for your letters of October 17 and November 21, and happy to have the suggestion that your Committee on the Bill of Rights of the Association of the Bar draft for the consideration of the Committee on Character and Fitness, and for the Appellate Division of the Supreme Court for the First Department, a set of basic rules for the examination of applicants for admission to the New York Bar.

Perhaps it might be helpful if Professor McKay were to let me narrate fully to him the procedures which we have followed for many years, since I apprehend from the talk I had with him that he and the Committee may not be fully acquainted with the rules which we presently follow.

Briefly, our procedure is as follows:

1) When the New York State Board of Law Examiners has certified to the Character Committee the persons who

have passed the bar examination, the Character Committee sends a notice to each successful bar examination candidate, requesting that the applicant come to the office of the Committee and obtain a questionnaire.

2) When the applicant comes to the office of the Committee he is given the questionnaire, and in addition to printed instructions the staff members answer any questions the applicant may have, and tell him orally what is necessary to put his completed questionnaire in good form.

3) When the questionnaire has been filed, the Committee staff conduct a routine investigation, using various public agencies, as the police department, for information. The staff also may investigate matters disclosed by the applicant in his questionnaire, where such matters may require further investigation. The applicant may be asked to furnish further information, where such is necessitated by answers already given in the questionnaire. A common instance is where answers to the questionnaire state that the applicant has been divorced, or where a marriage has been annulled, and where we may wish copies of the pleadings and decree, and, in some cases, a transcript of the evidence. There are an infinite variety of different situations where the applicant's answers to the questionnaire may disclose that further information is needed, and where the applicant is asked to furnish such further information.

4) Voluntary information, from time to time, is submitted to the Committee by third parties. For instance, a law school Dean may see in The New York Law Journal the list of those persons who have passed the bar examination, and may find a name which is similar to a person who was dismissed from his school. The Dean may suggest to the Committee the advisability of determining whether or not the applicant is the same person as the

one dismissed from the Dean's law school, and if so what representations the applicant made to get into the second law school.

5) The applicants are then examined orally. There being ten members of the Committee, it is divided into morning and afternoon sub-committees. The applicant is examined by one member of the Committee. If the Committee member is satisfied as to the character and fitness of the applicant, the Committee member reports favorably to the full Committee, and the applicant is certified to the court for admission. If the Committee member is of opinion that there are questions which adversely affect the applicant and therefore need further Committee consideration, the Committee member refers the matter to the sub-committee on which the Committee member is sitting. Where such questions still persist, the Chairman may refer the matter to the full Committee. These matters may range all the way from questions of residence to questions involving serious moral turpitude.

6) If after consideration by the sub-Committee, or the full Committee, there still remain questions as to the applicant's character and fitness, the applicant is examined orally by either the sub-Committee or the full Committee. A stenographic transcript of the examination is taken by a Supreme Court reporter.

Thus, where the applicant's questionnaire, or the Committee's investigation discloses facts adverse to the applicant, the applicant is given a full hearing with respect to these adverse facts and a stenographic transcript is made of his testimony. No applicant is ever turned down on *ex parte* information. It is on the explanation and the testimony of the applicant himself regarding the adverse information that the Committee decision to recommend admission or rejection is made, and not upon *ex parte* facts.

Appendix A

For the more than a quarter of a century during which I have been a member of the Committee, I know of no applicant who has been rejected on *ex parte* information. Where the Committee certifies to the Court that it cannot certify the applicant has the requisite character and fitness for admission to the Bar, that certification is based entirely on the record made by the applicant himself in his questionnaire and his oral examination.

To illustrate, a perhaps amusing incident occurred some years ago, where the Governor of a nearby state gave to the Committee a flambouyant typewritten letter of recommendation for an applicant for admission on motion, with a carbon copy to the applicant. In the lower left-hand corner of the ribbon original there was a pen and ink postscript to the effect that the applicant was no good and should not be admitted to the New York Bar. Our examination of the background demonstrated that the man writing the letter had a personal bias. The Committee did not deem it even necessary to bring the matter to the attention of the applicant or to examine him orally. A rather recent incident arose where a third party wished to give adverse and confidential information to a Committee member. The informant was told he would have to file an affidavit with the Committee setting forth the alleged adverse facts in order that the applicant might be examined personally on such alleged adverse facts. The affidavit was not filed.

You will see from the above that:

1) To my knowledge no applicant is ever rejected on *ex parte* information.

2) Where adverse information comes to the attention of the Committee, the applicant is examined orally and on his explanation of the facts is either certified for admission or rejected. The applicant thus has the privilege of con-

frontation in the fullest sense of the word, because it is on his appearance and testimony before the Committee, and his alone, that the decision to certify his admission or rejection is made. In examining orally an applicant on adverse matters, the applicant has full opportunity, not only to explain the facts completely but also to demonstrate his candor and truthfulness. Obviously, evasiveness and lack of candor in the applicant's oral examination is a factor to be considered.

The above procedure relates to applicants who have passed the New York Bar examination. The same procedure applies to applicants for admission on motion, where, in addition, the applicant is asked to furnish the Committee with a report from the National Conference of Bar Examiners.

You will agree, I am sure, that to permit an applicant to have, as it were, an examination before trial of the files of the Committee, and a disclosure of the sources of information, especially those from public authorities, as well as from private citizens, deans of law schools, etc., would make it extremely difficult for the Committee to obtain such information. Since the information is used only for the purpose of getting an explanation from the applicant regarding the facts, and since on the applicant's own explanation the decision of certification or rejection is made, I personally can see no need for a rule which would require the Committee to confront applicants with the public authorities or persons who had given such information. Indeed, that type of confrontation not only would make it extremely difficult for the Committee to get cooperation from the public authorities and other outside sources, but probably would result in undetermined issues of fact. It is much better, in my opinion, that our present procedure be followed, and that the information given to the Committee by outside parties be used merely as a basis for

giving the applicant an opportunity to explain the matter himself.

I agree entirely with the views expressed by you with reference to the question as to whether or not the Association of the Bar should file a brief *amicus* in *Willner* v. *The Committee on Character*. Certiorari was granted, as you know, not upon the full record, but only upon the very short record made on the last application for rehearing. For the Association of the Bar, or its Committee, to file a brief *amicus* in such situation, would seem to me quite extraordinary under the circumstances, especially in view of the decisions of the Appellate Division and the Court of Appeals in the *Willner* matter.

With sentiments of esteem and cordial greetings, I am

Sincerely yours,

LOWELL WADMOND

cc: Hon. Bernard Botein
Hon. Daniel M. Cohen